No. 01-46-CFX
Status: GRANTED

Title: Federal Maritime Commission, Petitioner
v.
South Carolina State Ports Authority, et al.

Docketed:
July 10, 2001

Court: United States Court of Appeals for
the Fourth Circuit

Counsel for petitioner: Hughey, Phillip Christopher,
Solicitor General

Counsel for respondent: Dean Jr., Warren L., Wall, Susan
Taylor, Campbell, Elizabeth H., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	May 18 2001	G	Application (00A1011) to extend the time to file a petition for a writ of certiorari from June 10, 2001 to July 10, 2001, submitted to The Chief Justice.
2	May 21 2001		Application (00A1011) granted by the Chief Justice extending the time to file until July 10, 2001.
3	Jul 10 2001	G	Petition for writ of certiorari filed. (Response due September 10, 2001)
4	Jul 10 2001		Appendix of petitioner Fed. Maritime Comm'n filed.
5	Jul 10 2001		Solicitor General authorized FMC to file its own petition.
7	Aug 1 2001		Order extending time to file response to petition until September 10, 2001.
8	Aug 1 2001		This extension is granted for all respondents.
10	Sep 7 2001	G	Motion of United States Maritime Alliance Limited, et al. for leave to file a brief as amici curiae filed.
9	Sep 10 2001		Brief of respondent South Carolina State Ports Authority in opposition filed.
11	Sep 10 2001	G	Motion of National Association of Waterfront Employers for leave to file a brief as amicus curiae filed.
12	Sep 10 2001		Brief of respondent United States in opposition filed.
13	Sep 20 2001		Reply brief of petitioner Federal Maritime Commission filed.
14	Sep 20 2001		LODGING consisting of ten copies of an Order issued in the proceeding below submitted by counsel for the petitioner..
15	Sep 26 2001		DISTRIBUTED. October 12, 2001 (Page 1)
16	Oct 15 2001		Motion of United States Maritime Alliance Limited, et al. for leave to file a brief as amici curiae GRANTED.
17	Oct 15 2001		Motion of National Association of Waterfront Employers for leave to file a brief as amicus curiae GRANTED.
18	Oct 15 2001		Petition GRANTED. SET FOR ARGUMENT February 25, 2002. **********
22	Nov 28 2001		Brief amici curiae of United States Maritime Alliance Limited, et al. filed.
19	Nov 29 2001		Brief amicus curiae of National Association of Waterfront Employers filed.
21	Nov 29 2001		Brief of United States filed.
23	Nov 29 2001		Joint appendix filed.
24	Nov 29 2001		Brief of petitioner Federal Maritime Commission filed.
25	Nov 29 2001		Brief amicus curiae of AFL-CIO filed.

No. 01-46-CFX

Entry	Date	Note	Proceedings and Orders
26	Nov 29 2001		Brief amici curiae of Edward M. Kennedy and Russell Feingold filed.
27	Dec 11 2001		Time to file respondent's brief on the merits extended to and including January 11, 2002.
28	Dec 14 2001		CIRCULATED.
29	Jan 4 2002	G	Motion of the Solicitor General for divided argument filed.
30	Jan 9 2002		Response of the Federal Maritime Commission to the motion of the United States for divided argument.
31	Jan 11 2002	X	Brief of respondent South Carolina State Ports Authority filed.
32	Jan 11 2002	X	Brief amici curiae of National Governors Association, et al. filed.
33	Jan 11 2002	X	Brief amicus curiae of Charleston Naval Complex Redevelopment filed.
34	Jan 11 2002	X	Brief amici curiae of Maryland, et al. filed.
36	Jan 22 2002		Motion of the Solicitor General for divided argument GRANTED. and the time for oral argument is divided as follows: 20 minutes for the Federal Maritime Commission and 10 minutes for the Solicitor General.
37	Feb 11 2002	X	Reply brief of respondent United States filed.
38	Feb 11 2002	X	Reply brief of petitioner Federal Maritime Commission filed.
39	Feb 25 2002		ARGUED.

Supreme Court, U.S.

01-46 JUL 10 2001

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED

The Federal Maritime Commission, an independent regulatory agency, administers the Shipping Act of 1984. Section 11(a) of the Act provides that "[a]ny person may file with the Commission a sworn complaint alleging a violation of this Act * * * and may seek reparation for any injury caused to the complainant by that violation." The question presented is:

Whether Congress may by statute authorize the Federal Maritime Commission to adjudicate complaints filed by private persons against state-run ports, or whether the statutory provision permitting the adjudication of such complaints is barred by the Eleventh Amendment to the United States Constitution.

LIST OF PARTIES TO THE PROCEEDING

The South Carolina State Ports Authority appeared before the United States Court of Appeals for the Fourth Circuit as the petitioner. The Federal Maritime Commission, and the United States of America, appeared before the court of appeals as respondents.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
A. Maritime Regulation	3
B. The Eleventh Amendment and State Sovereign Immunity From Suit	4
C. Proceedings Before the Federal Maritime Commission	5
1. Maritime Services' administrative complaint before the Commission	5
2. The Commission's decision: the Eleventh Amendment does not apply to administrative adjudications held under the Shipping Act of 1984	6
D. Proceedings Before the Court of Appeals	7
REASONS FOR GRANTING THE WRIT	8
I. The Court of Appeals Held a Federal Statutory Provision Unconstitutional	9
II. There Are Fundamental Differences Between a Lawsuit Before a Court and an Administrative Adjudication Before an Agency	11
A. The Federal Maritime Commission is not a court and cannot exercise "[t]he Judicial power of the United States"	12

B. An administrative adjudication before the Federal Maritime Commission is not a lawsuit 14

C. Authority over maritime commerce is a unique federal interest 16

III. The Court of Appeals' Application of State Sovereign Immunity From Suit to Administrative Adjudications Conflicts With the Opinions of the Sixth, Eighth, and Ninth Circuits 18

A. The courts of appeals are now in conflict ... 18

B. *Alden v. Maine* should have no effect on the conflict in principle between the circuits 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Constitutional Provision

U.S. Const. amend. XI ..... *passim*

Cases

Alden v. Maine, 527 U.S. 706 (1999) ..... *passim*

American Export-Isbrandtsen Line, Inc. v. Federal Maritime Comm'n, 444 F.2d 824 (D.C. Cir. 1970) 16

Butz v. Economou, 438 U.S. 478 (1978) 14

California v. United States, 320 U.S. 577 (1944) . 10

Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984) 13

Delaware Dep't of Health & Social Services v. United States Dep't of Education, 772 F.2d 1123 (3rd Cir. 1985) 20

Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981) 20

Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991) 12, 13, 17

Hans v. Louisiana, 134 U.S. 1 (1890) 5

Hensel v. Office of Chief Administrative Hearing Officer, 38 F.3d 505 (10th Cir. 1994) 21

National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n, 59 F.3d 1281 (D.C. Cir. 1995) 17

Premo v. Martin, 119 F.3d 764 (9th Cir. 1997), cert. denied, 522 U.S. 1147 (1998) 18, 19

Securities and Exchange Comm'n v. Chenery Corp., 332 U.S. 194 (1947) 11

Cases—Continued:

Securities and Exchange Comm'n v. United Benefit Life Ins. Co., 387 U.S. 202 (1967) 22

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) ..... *passim*

South Carolina State Ports Auth. v. Georgia Ports Auth., 49 Fed. Reg. 7657 (Thursday, March 1, 1984) 10

Tennessee Dep't of Human Serv. v. United States Dep't of Education, 979 F.2d 1162 (6th Cir. 1992) 19, 20

United States v. American Union Transp., Inc., 327 U.S. 437 (1946) 17

United States v. Gainey, 380 U.S. 63 (1965) 9

United States v. Locke, 529 U.S. 89 (2000) 16, 18

United States v. Ruzicka, 329 U.S. 287 (1946) ... 17-18

United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932) 3

Upshur County v. Rich, 135 U.S. 467 (1890) 15

Statutes and Rules

28 U.S.C. 1254(1) 1

28 U.S.C. 2341 *et seq.* 2, 13

28 U.S.C. 2350(a) 1, 22

Shipping Act of 1984, Pub. L. 98-237, 98 Stat. 67, 46 U.S.C. app. 1701 *et seq.* 3-4

46 U.S.C. app. 1709(b)(10) 6

46 U.S.C. app. 1709(d)(4) 6

46 U.S.C. app. 1710(a) ..... *passim*

46 U.S.C. app. 1710(b) 15

46 U.S.C. app. 1710(f) 4

Statutes and Rules—Continued:

46 U.S.C. app. 1712(e) 12

46 U.S.C. app. 1713(c) 12

Interstate Commerce Act, 24 Stat. 379 (1887) ... 3

Shipping Act, 1916, 39 Stat. 728 ..... 3, 4, 10

Reorganization Plan No. 7 of 1961, 75 Stat. 840 ..... 4, 19

Interstate Commerce Commission Termination Act, Pub. L. 104-88, 109 Stat. 8033 (1995) 4

46 C.F.R. 502.146(a) (1999) 6

Miscellaneous

53 Cong. Rec. 8276 (1916) 3, 10

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Federal Maritime Commission respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit in *South Carolina State Ports Authority v. Federal Maritime Commission and United States of America*, No. 00-1481 (March 12, 2001).

OPINIONS BELOW

The opinion of the court of appeals is reported at 243 F.3d 165 and is reproduced as Appendix A in the separately bound appendix to this Petition ("Pet. App.") at 1a-25a. The opinion of the Federal Maritime Commission is unofficially reported at 28 Shipping Reg. (P & F) 1385 and is reproduced as Appendix B at Pet. App. 27a-38a. The opinion of the administrative law judge is unofficially reported at 28 Shipping Reg. (P & F) 1307 and is reproduced as Appendix C at Pet. App. 39a-62a.

JURISDICTION

The court of appeals entered its judgment on March 12, 2001. On May 21, 2001, Chief Justice Rehnquist extended the time for filing this petition to and including July 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 2350(a) and 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Section 11(a) of the Shipping Act of 1984, 46 U.S.C. app. 1710(a), provides: "Any person may file with the [Federal Maritime] Commission a sworn complaint alleging a violation of this Act * * * and may seek reparation for any injury caused to the complainant by that violation." Other relevant portions of the Shipping Act of 1984, 46 U.S.C. app. 1701 *et seq.*, are reproduced as Appendix D at Pet. App. 63a.

STATEMENT

This case involves the issue of whether the Eleventh Amendment to the United States Constitution prevents Congress from authorizing the Federal Maritime Commission ("Commission") to conduct administrative adjudications initiated by private persons against state-run ports. South Carolina Maritime Services, Inc. ("Maritime Services"), a South Carolina corporation that operates cruise ships, filed a complaint with the Commission, alleging that the South Carolina State Ports Authority ("SCSPA") had violated certain provisions of the Shipping Act of 1984 ("1984 Act"). The administrative law judge assigned by the Commission to hear the proceeding dismissed the complaint on the ground that SCSPA is an arm of the State of South Carolina and thus immune from adjudications under the Eleventh Amendment and the doctrine of state sovereign immunity from suit. The Commission, on its own motion, overruled that decision and held that sovereign immunity from suit does not apply to administrative adjudications before the agency. SCSPA then filed a petition for review with the United States Court of Appeals for the Fourth Circuit, invoking the court's jurisdiction under the Hobbs Act, 28 U.S.C. 2341 *et seq.* The court of appeals reversed the Commission's decision, finding that "under its Article I powers, Congress cannot authorize private parties to haul unconsenting states before the adjudicative apparatus of federal agencies and commissions." Pet. App. 25a.

A. Maritime Regulation

In order to bring the question presented into proper focus, a brief review of the origin of the statutory provisions at issue is necessary. The Shipping Act, 1916 ("1916 Act"), 39 Stat. 728, established federal regulation of ocean vessel common carriers, conferences of such common carriers, marine terminal operators, and other maritime businesses. Marine terminal operators, including state-run ports, were included in this regulatory scheme because the 1916 Act's original sponsors believed that effective regulation required oversight not only of vessel operators, but also of the port facilities they utilized. 53 Cong. Rec. 8276 (1916). The 1916 Act granted limited antitrust immunity to price-fixing activities, and created a regulatory program that sought to eliminate anticompetitive abuses. Congress reasoned that shielding conference activity from antitrust attack would enable shippers to enjoy the benefits of more frequent and regular sailings, greater rate stability, and enhanced capital investment in new vessels. The industry would thereby be spared the economic injury inherent in a boom-to-bust cycle. The 1916 Act was based in large part on the Interstate Commerce Act ("ICA"), 24 Stat. 379 (1887). See, *e.g.*, *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 481 (1932) ("In its general scope and purpose, as well as in its terms, [the 1916 Act] closely parallels the Interstate Commerce Act"). Section 22 of the 1916 Act established a right to file complaints with the agency alleging violations of the statute, and gave complainants the right to seek monetary reparation for actual injuries. 39 Stat. 728, 736. This is similar to section 13 of the ICA. 24 Stat. 379, 383-384.

The 1984 Act replaced the 1916 Act in most respects, and was modeled after the 1916 Act in large part.[1] Pub. L.

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[1] One key difference between the two statutes is that the 1916 Act governed regulation of both domestic and international oceanborne maritime commerce, whereas the 1984 Act solely governs international commerce, except for the statute's coverage of marine terminal operators like SCSPA,

(Continued . . .)

98-237, 98 Stat. 67, 46 U.S.C. app. 1701 *et seq.* Like section 22 of the 1916 Act before it, section 11(a) of the 1984 Act permits any person to file a complaint alleging a violation of the Act and to seek monetary reparation. Such a complaint may be filed against any of the maritime businesses regulated by the statute, including state-run marine terminal operators like SCSPA. The Commission adjudicates complaints by first holding administrative hearings, and then issuing a written report "stating its conclusions, decisions, findings of fact, and order." 46 U.S.C. app. 1710(f). Ordinarily, the agency assigns an administrative law judge to conduct complaint proceedings in the first instance, with the Commission itself hearing appeals from the judge's rulings; the Commission may also on its own motion review the judge's determinations.

The Commission was established in 1961 as an independent Executive Branch agency responsible for administering the 1916 Act, and presently regulates the foreign oceanborne commerce of the United States under the 1984 Act. Reorganization Plan No. 7 of 1961, 75 Stat. 840. Prior to 1961, the 1916 Act was administered by a succession of agencies similar in design to the Commission.

B. The Eleventh Amendment and State Sovereign Immunity From Suit

The scope of application of the Eleventh Amendment to the Constitution, and the related doctrine of state sovereign immunity from suit, is at issue in this case. The Eleventh Amendment provides that "[t]he Judicial power of the United

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(. . . continued)

over which the 1984 Act confers authority to regulate both domestic offshore and international commerce. 46 U.S.C. app. 1702(14). It is also worth noting that the remainder of the 1916 Act not replaced by the passage of the 1984 Act was abolished by the Interstate Commerce Commission Termination Act, Pub. L. 104-885, 109 Stat. 8033 (1995).

States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The text of the Amendment forbids a citizen of one state from suing another state in federal court without that state's consent. In *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court found that state sovereign immunity is more expansive than the linguistic boundaries of the Eleventh Amendment, and forbade a suit in federal court against a state by a citizen of that same state.

The Court has addressed the issue of state sovereign immunity from suit in several recent cases. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court ruled that Congress lacks the authority to abrogate a state's sovereign immunity from suit in federal court under the Indian Gaming Regulatory Act. The Court limited its inquiry in *Seminole Tribe* to whether Congress could "expand the jurisdiction of the federal courts beyond the bounds of Article III" of the Constitution. *Id.* at 65. In *Alden v. Maine*, 527 U.S. 706 (1999), the Court found that Congress may not abrogate state sovereign immunity from suit in a state's own courts under the Fair Labor Standards Act. The Court recognized that state sovereign immunity arises from the "system of federalism," and not exclusively from the text of the Eleventh Amendment; it described such immunity in terms relating to the possibility of "suit * * * prosecuted in state or federal court." *Id.* at 745.

C. Proceedings Before the Federal Maritime Commission

1. Maritime Services' administrative complaint before the Commission

Maritime Services filed a complaint with the Commission alleging that SCSPA had violated the 1984 Act by refusing to allow Maritime Services' cruise ship, the M/V TROPIC SEA, to berth at SCSPA's facilities in Charleston, South Carolina.

Maritime Services intended to offer cruises to nowhere, and cruises to the Bahamas. Gambling would be allowed on these cruises.

Maritime Services' complaint was based on an allegation of disparate treatment - it asserted that SCSPA *had* permitted another cruise ship operator to offer gambling cruises from Charleston. Maritime Services averred that by letting one operator offer gambling cruises, but forbidding Maritime Services from offering such cruises, SCSPA had violated section 10(b)(10) of the 1984 Act, which prohibits marine terminal operators from "unreasonably refus[ing] to deal or negotiate," and section 10(d)(4) of the 1984 Act, which forbids marine terminal operators from giving "any undue or unreasonable preference or advantage or impos[ing] any undue or unreasonable prejudice or disadvantage with respect to any person." Pet. App. 63a. Maritime Services asked the Commission to seek a temporary restraining order and preliminary injunction in district court against SCSPA; to award reparations, interest, and attorneys' fees to Maritime Services; to order SCSPA to cease and desist from violating the 1984 Act; and to award any other just and proper relief.

Pursuant to Commission regulations, 46 C.F.R. 502.146(a) (1999), Maritime Services' complaint was assigned to an agency administrative law judge. SCSPA filed a motion to dismiss with the judge, arguing that as an arm of the State of South Carolina, it enjoys sovereign immunity from complaint proceedings before the Commission. On January 5, 2000, the administrative law judge granted SCSPA's request and dismissed the complaint. Pet. App. 39a-62a. The Commission determined on its own motion to review the judge's conclusions.

2. The Commission's decision: the Eleventh Amendment does not apply to administrative adjudications held under the Shipping Act of 1984

On March 23, 2000, the Commission issued an order overruling the administrative law judge and holding that the doc-

trine of state sovereign immunity does not preclude administrative proceedings initiated by private complainants against state-run ports. Pet. App. 27a-38a. The Commission, reviewing Supreme Court precedent, observed that state sovereign immunity from suit has always been applied to lawsuits before courts, not to administrative adjudications before Executive Branch agencies. The Commission ruled that:

> The doctrine of state sovereign immunity, even freed from the linguistic boundaries of the Eleventh Amendment, is meant to cover proceedings before judicial tribunals, whether Federal or state, not executive branch administrative agencies like the Commission. There is no compelling reason offered by either the [administrative law judge] or SCSPA to extend the reach of the Supreme Court's holdings in *Seminole Tribe* and *Alden*, and thereby nullify the Commission's jurisdiction over state ports, which jurisdiction has been in place for decades. The Shipping Act of 1984, and the Shipping Act, 1916 before it, illustrate Congress's decision that the regulation of ports, whether publicly or privately owned, is essential to protecting the nation's oceanborne commerce. Commission jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports. Accordingly, the Commission has in the past rebuffed attempts to restrict its jurisdiction over public port authorities.

Pet. App. 33a (footnote omitted). The Commission thus held that Maritime Services' complaint proceeding against SCSPA could go forward.

D. Proceedings Before the Court of Appeals

After the Commission issued its decision, SCSPA filed a petition for review with the court of appeals. The proceeding before the agency was held in abeyance pending the outcome of the petition for review. The Commission and the United

States of America appeared as respondents before the court, each filing a brief and participating separately at the oral argument.

On March 12, 2001, the court of appeals issued its opinion and judgment, in which it overruled the Commission's conclusion that state sovereign immunity does not apply to administrative adjudications. The court found that:

> any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states would not have passed muster at the time of the Constitution's passage nor after ratification of the Eleventh Amendment. Such an adjudication is equally as invalid today, whether the forum be a state court, a federal court, or a federal administrative agency.

Pet. App. 13a.

The court of appeals rejected the Commission's argument that the agency is not a court exercising the judicial power of the United States, finding the issue "irrelevant to the disposition of this case." Pet. App. 11a. Addressing the Commission's contention that administrative proceedings are not "suit[s] in law or equity" within the scope of the Eleventh Amendment, the court found that an administrative adjudication's "placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication" to which the Eleventh Amendment should apply. Pet. App. 15a. The court of appeals also declined to accept the Commission's argument that state sovereign immunity would not have attached to the regulation of maritime commerce, a subject of historic federal interest fundamental to the genesis of the Constitution. Pet. App. 22a-23a.

REASONS FOR GRANTING THE WRIT

The court of appeals held unconstitutional the provision of the Shipping Act of 1984 enabling private persons to file complaints against state-run ports. Given the significance of a

judicial holding invalidating an Act of Congress, this Court should review the court of appeals' determination that "under its Article I powers, Congress cannot authorize private parties to haul unconsenting states before the adjudicative apparatus of federal agencies and commissions." Pet. App. 25a. It is essential that the Court provide guidance on the existence and extent of state sovereign immunity in the federal administrative setting. Because the scope of sovereign immunity from suit is the only issue in this case, the Court is presented with a considerable opportunity to address the question in a factually straightforward proceeding free from other potentially controlling issues. The case assumes further significance because the extraordinary federal interest in the effective and uniform regulation of maritime commerce will be severely affected by the court of appeals' decision. A final basis for review is that the court of appeals' opinion creates a conflict in principle among the circuits on the application of sovereign immunity from suit to administrative adjudications.

I. The Court of Appeals Held a Federal Statutory Provision Unconstitutional

The court of appeals' decision holds unconstitutional a provision of the 1984 Act. See *United States v. Gainey*, 380 U.S. 63, 65 (1965) (the Court may grant certiorari "to review the exercise of the grave power of annulling an Act of Congress"). Ruling that state sovereign immunity from suit applies before "federal agencies and commissions," Pet. App. 25a, the court of appeals determined that private persons may not file administrative complaints against unconsenting states with the Commission under section 11(a) of the 1984 Act. By reaching this conclusion, the court construed a significant constitutional principle in a novel manner and applied it to a branch of the federal government to which it has never before applied.

This is important for a number of reasons. First, the scope of the Eleventh Amendment and the doctrine of state sovereign immunity is an issue of national significance. As

interpreted by the court of appeals, the Eleventh Amendment would invalidate any Congressional determination to vest in administrative agencies the capacity to adjudicate disputes initiated by private persons against unconsenting states. This Court granted certiorari in *Alden* "in light of the importance" of a decision by the Maine Supreme Judicial Court that "call[ed] into question the constitutionality of the provisions of the [Fair Labor Standards Act] purporting to authorize private actions against States in their own courts." 527 U.S. at 712. The constitutionality of the private complaint provisions of the 1984 Act have similarly been called into question by the court of appeals.

Moreover, the court of appeals' decision would immunize state-run ports from a type of regulation to which Congress thought they should be subject. 53 Cong. Rec. 8276 (1916).[2] This Court has held that the states are subject to Commission regulation. *California v. United States*, 320 U.S. 577, 585-6 (1944). By granting the states immunity from certain Commission proceedings, the court of appeals' decision affects the relationship between the states and a federal agency.

In terms of immediate application, the court of appeals' decision will prevent the Commission from administering the 1984 Act as the statute is designed, because the agency will be precluded from regulating state-run ports through the use of privately-initiated administrative adjudications. In its order in this proceeding, the Commission noted that such reg-

[2] Congress' objective of ensuring that competitive economic principles apply to maritime commerce would be thwarted by the court of appeals' decision. State-run ports compete against one another, and against non-state entities, for business. See, *e.g.*, *South Carolina State Ports Auth. v. Georgia Ports Auth.*, 49 Fed. Reg. 7657 (Thursday, March 1, 1984) (SCSPA filed a complaint with the Commission against the Georgia Ports Authority, alleging that the latter violated the Shipping Act, 1916 by using an inaccurate consulting firm report to solicit steamship lines and to divert cargo from Charleston, S.C. to Savannah, Georgia). Immunity from some forms of Commission regulation would give state-run ports a competitive advantage over other maritime businesses.

ulatory authority is crucial: "Commission jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports." Pet. App. 33a. The Commission will lose an important component of its regulatory authority under the court of appeals' interpretation of the scope of state sovereign immunity from suit.[3]

The court of appeals invalidated a federal statutory provision of nationwide applicability and significance, in a manner that affects the relationship between a federal agency and the states. This is precisely the type of dispute that requires this Court's review and guidance, and the Court should therefore grant certiorari.

II. There Are Fundamental Differences Between a Lawsuit Before a Court and an Administrative Adjudication Before an Agency

In applying state sovereign immunity to the administrative setting, the court of appeals relied on *Seminole Tribe* and *Alden* to guide its analysis. Pet. App. 4a. Reviewing those cases, the court concluded that "embedded in the structure of the Constitution is the principle that a private party may not file a complaint against an unconsenting state." Pet. App. 9a. The court then analyzed the rationale presented in the Commission's decision, which held that this principle applies to lawsuits before courts, not to administrative adjudications before the agency. A description of the Commission's arguments in defense of its decision, and the court's stated grounds for rejecting those arguments, will illustrate not only the importance of the question presently before this Court,

[3] In *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947), this Court found that the determination whether to regulate through adjudication or rulemaking properly belongs to the agency. By creating a separate category of marine terminal operators not subject to one type of Commission regulation, the court of appeals' judgment infringes upon the agency's discretion to determine the form its regulatory action should take.

but additionally the significant differences between this case, and *Seminole Tribe* and *Alden*.

A. The Federal Maritime Commission is not a court and cannot exercise "[t]he Judicial power of the United States"

In defense of its decision, the Commission argued to the court of appeals that the agency is not a court and does not exercise the judicial power of the United States. The Eleventh Amendment forbids attempts to apply "[t]he Judicial power of the United States" to a suit against an unconsenting state. U.S. Const. amend. XI. Absent an exercise of this power, the Eleventh Amendment and state sovereign immunity would seem to be inapplicable. Furthermore, this Court in *Alden* applied sovereign immunity to proceedings before state courts, which are judicial bodies exercising judicial power. 527 U.S. at 749. Absent an exercise of judicial power, the analysis in *Alden* would also seem inapplicable.

In contending that it does not exercise judicial power, the Commission relied on this Court's decision in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), which held that only agencies with an "exclusively judicial role" are capable of exercising the judicial power of the United States. 501 U.S. at 892. The Commission's administrative tasks under the 1984 Act are numerous and diverse, and the agency does not have an exclusively judicial role, as the court of appeals recognized. Pet. App. 11a ("the FMC also exercises executive, legislative, and administrative responsibilities"). Nor does the Commission have traditional judicial powers: it cannot punish contempt, but must seek court action for that. 46 U.S.C. app. 1713(c) (upon a party's failure to comply with a Commission subpoena, the Attorney General may seek enforcement of the subpoena in district court); see also 46 U.S.C. app. 1712(e) (upon a party's failure to pay a civil penalty assessed by the Commission, the Attorney General may seek recovery in district court). The Commission's adjudicatory findings are reviewed as administrative agency decisions, not as court rulings. See *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (standards for review of an agency's statutory interpretations). Under the Hobbs Act, 28 U.S.C. 2341 *et seq.*, the Commission is a party to proceedings to review its orders in the courts of appeals, confirming the agency's interest in the interpretation and enforcement of the statutes it administers. Furthermore, unlike an exclusively judicial body, the Commission has program interests which would be harmed by a finding of sovereign immunity, inasmuch as the agency would be precluded from using adjudication as a means of implementing its policies. Under this Court's decision in *Freytag*, the Commission plainly does not exercise the judicial power of the United States. This is not to say that the Commission does not adjudicate, but rather, that such adjudication is not judicial. In a concurring opinion in *Freytag*, Justice Scalia observed:

> It is no doubt true that all such [administrative] bodies "adjudicate," *i.e.*, they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing "inherently judicial" about "adjudication." To be a federal officer and to adjudicate are necessary but not sufficient conditions for the exercise of judicial power, as we recognized almost a century and a half ago.

501 U.S. at 909 (Scalia, J., concurring in part and concurring in the judgment).

While acknowledging this Court's holding in *Freytag*, the court of appeals nevertheless ruled that whether or not the Commission exercises judicial power "is irrelevant to the disposition of this case." Pet. App. 11a. The court recognized that under *Freytag*, some "Article I tribunals may exercise the judicial power of the United States," and for this reason "it would seem anomalous to limit state sovereign immunity strictly to an Article III proceeding." Pet. App. 11a. However, even if certain Article I tribunals exercise the judicial power

(and some, like the Tax Court, do exercise this power), the Commission is unquestionably not such a tribunal.

This Court has never applied the doctrine of state sovereign immunity from suit to a federal tribunal without taking into account the language of the Eleventh Amendment, which specifically addresses "[t]he Judicial power." Moreover, this Court's holding in *Alden* examined proceedings before state courts, which apply the judicial power of their respective states; *Alden* did not involve an administrative agency.[4] In this case, the court of appeals refused to analyze whether state sovereign immunity from suit can apply to a body that does not exercise judicial power, instead finding such an inquiry "irrelevant." Pet. App. 11a.

B. An administrative adjudication before the Federal Maritime Commission is not a lawsuit

The Commission also argued to the court of appeals that administrative adjudications before the agency are not lawsuits. The Eleventh Amendment addresses "suit[s] in law and equity," and this Court in *Alden* was concerned with suits prosecuted in state or federal court. 527 U.S. 706, 745 (1999). Examining the Commission's reasoning that a privately-initiated complaint proceeding before the agency constitutes a form of regulation, not a lawsuit, the court of appeals focused on the role of the administrative law judge in an agency proceeding. Pet. App. 15a-17a. Relying on *Butz v. Economou*, 438 U.S. 478 (1978), which extended judicial immunity to administrative law judges, the court of appeals ruled that because an agency adjudication contains many of the same procedural safeguards as a court suit, it is functionally interchangeable

[4] Thus, the Court's holding in *Alden* that sovereign immunity from suit applies "regardless of the forum" in which a complaint against an unconsenting state is filed, 527 U.S. at 749, does not also signify that the immunity is applicable regardless of the type of power exercised by a given forum. *Alden* assumed that a claim of sovereign immunity would be raised in a forum exercising judicial power.

with such a suit for sovereign immunity purposes. Pet. App. 15a-16a.

However, an administrative proceeding before the Commission is not a suit, despite the fact that such an adjudication employs procedures akin to those used in the district courts. "[A] proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions * * * is purely administrative in its character, and cannot, in any just sense, be called a suit." *Upshur County v. Rich*, 135 U.S. 467, 477 (1890).

Section 11(a) of the 1984 Act provides that any person may file a complaint "alleging a violation of this Act." 46 U.S.C. app. 1710(a). The complaint must be based upon the alleged commission of an act prohibited by statutory command, not on the vindication of a private right, and such a complaint invokes the Commission's executive power to enforce the law. Section 11(b), 46 U.S.C. app. 1710(b), states that a party against which a complaint is filed must either "satisfy the complaint or answer it in writing." Section 11(b) then mandates that "if the complaint is not satisfied [*i.e.*, not settled by the parties], the Commission shall investigate it in an appropriate manner and make an appropriate order." The Commission investigates the allegations in a complaint by holding hearings and issuing an order.

The Commission's order is not fungible with a court decision. It is a regulatory determination. The agency's findings and remedial orders carry out Congress' statutory objectives in regulating the nation's oceanborne foreign commerce. Such findings are not merely an *application* of the 1984 Act to a set of facts - they are a significant component of the Commission's obligation to *administer* the statute. In applying sovereign immunity from suit to proceedings before the Commission, the court of appeals declined to recognize the differences in both structure and purpose between a suit before a court and an administrative adjudication before an agency.

C. Authority over maritime commerce is a unique federal interest

The Commission further argued to the court of appeals that maritime regulation is an area of federal interest regarding which the Founders would have held sovereign immunity inapplicable. In *United States v. Locke*, 529 U.S. 89, 99 (2000), this Court recognized that maritime commerce is a field in which "the federal interest has been manifest since the beginning of our Republic and is now well established." Indeed, appreciation of the fundamental significance of maritime trade, and the role ports play in that trade, is long-standing. "The law for centuries has recognized that public wharves, piers and marine terminals are affected with a public interest. These [t]erminals stand athwart the path of trade." *American Export-Isbrandtsen Line, Inc. v. Federal Maritime Comm'n*, 444 F.2d 824 (D.C. Cir. 1970).

This Court ruled in *Alden* that "the contours of sovereign immunity are determined by the Founders' understanding." 527 U.S. at 734. The Founders' understanding as to maritime commerce is thus relevant in deciding whether sovereign immunity applies to proceedings before the Commission. Addressing interstate maritime navigation in *Locke*, the Court held that the federal government must be free to regulate "without embarrassment from intervention of the separate States" and that this "was cited in the Federalist Papers as one of the reasons for adopting the Constitution." 529 U.S. at 99. The Commission argued to the court of appeals that it is essential to consider that the Founders' views on maritime commerce must pertain to the scope of state sovereign immunity from suit, where the "suit" in question is in fact an administrative adjudication used to effect maritime regulation.

The court of appeals rejected the Commission's argument, concluding that this Court's opinion in *Seminole Tribe* "made clear that a strong federal interest in a particular subject matter cannot determine the application of sovereign immunity to a lawsuit." Pet. App. 22a. However, *Seminole Tribe* addressed

"the judicial power under Article III," and held that "Article I cannot be used to circumvent the constitutional limitations placed upon" such Article III jurisdiction. 517 U.S. at 72-73. As explained above, the Commission *cannot* exercise the judicial power, as this Court made clear in *Freytag*. Citation to *Seminole Tribe* merely raises the question whether the principles that apply to Article III court proceedings also apply to administrative adjudications.[5] It may be further noted that *Seminole Tribe* did not involve maritime commerce.

The Commission's concern with ensuring continued observation of the federal interest in maritime regulation reflects the immediate consequences the court of appeals' decision could unleash. If some ports become immune from privately-initiated complaint proceedings, this will undermine the Commission's ability to regulate ports uniformly throughout the United States. In *United States v. American Union Transp., Inc.*, 327 U.S. 437, 443 (1946), the Court, addressing the 1916 Act, recognized that it is critical not to "divide persons 'furnishing wharfage, dock, warehouse, or other terminal facilities' into regulated and unregulated groups." Yet this is the practical result of the court of appeals' decision. Because some ports are arms of their respective states, while others are municipal corporations or private marine terminal operators, the Commission's regulation by administrative adjudication would apply unevenly if state sovereign immunity from suit were applicable to the agency's proceedings. The Commission explained that its "jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports." Pet. App. 33a. The Commission's administration of the 1984 Act will be greatly, and adversely, affected if the court of appeals' decision stands. See *United States v. Ruzicka*, 329 U.S. 287, 288 (1946) (the Court

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[5] It has generally been thought that the principles applicable to Article III court proceedings do not apply to administrative adjudications. See, *e.g.*, *National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n*, 59 F.3d 1281, 1289 (D.C. Cir. 1995) ("Article III does not apply to an agency adjudication").

may grant certiorari to review matters important to the effective administration of a federal statute).

This Court should grant the Commission's petition in order to review the court of appeals' holding that non-judicial tribunals established by Congress to hear administrative complaints are barred by the Eleventh Amendment from adjudicating cases initiated by private persons against state entities. The particular federal interest in maritime commerce and its importance in the origin of the Constitution further support granting the writ.

III. The Court of Appeals' Application of State Sovereign Immunity From Suit to Administrative Adjudications Conflicts With the Opinions of the Sixth, Eighth, and Ninth Circuits

While the importance of this issue is reason enough to grant the writ, there is a conflict in principle between the circuits as well. The existence of a conflict in principle is particularly important in the context of a nationwide regulatory scheme like the 1984 Act, where opposing views in the courts of appeals could lead to differing levels of regulation based solely upon the geographic location of the parties involved. This is ordinarily considered detrimental to any nationwide regulatory scheme; it should be of even greater concern when, as here, it involves international trade, and interferes with "a uniformity of regulation for maritime commerce." *Locke*, 529 U.S. at 108.

A. The courts of appeals are now in conflict

In *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997), cert. denied, 522 U.S. 1147 (1998), the Ninth Circuit addressed the issue of the applicability of sovereign immunity to the administrative setting. The statute at issue in *Premo*, the Randolph-Sheppard Vending Stand Act, created a cooperative program providing employment opportunities to blind persons, and required states participating in the program to submit to the adjudication of disputes through arbitration panels convened by

the Secretary of Education. Any award granted by such a panel "is reviewed as agency action under the standards set forth in the Administrative Procedure Act." 119 F.3d at 768. Examining the State of California's contention that proceedings before administrative tribunals are barred by the Eleventh Amendment, the Ninth Circuit ruled that sovereign immunity does not apply to arbitration panels because the doctrine applies only to entities exercising the judicial power of the United States. 119 F.3d at 769.[6] The court thus found California's claim of immunity "wholly unsupported." *Id.* The Ninth Circuit also observed that the Eleventh Amendment "does not purport to affect proceedings in tribunals established by statute." *Id.* The Commission, it should be noted, was established by statute, 75 Stat. 840, for the purpose of administering several maritime statutes, now including the 1984 Act. It is also significant that *Premo* was decided subsequent to this Court's opinion in *Seminole Tribe*; the Ninth Circuit's decision thereby indicates an understanding that *Seminole Tribe* applies to Article III federal courts, not to administrative agencies.

The Sixth Circuit addressed the scope of state sovereign immunity from suit in a similar case under the Vending Stand Act involving the State of Tennessee, and held that "the Eleventh Amendment does not bar an Article I body from awarding retroactive damages against a state." *Tennessee Dep't of Human Serv. v. United States Dep't of Education*, 979 F.2d 1162, 1168 (6th Cir. 1992). The Sixth Circuit found that state sovereign immunity from suit applies only to judicial bodies, not to administrative tribunals. The court observed that Ten-

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[6] The Vending Stand Act also provided a mechanism for enforcement of agency awards in federal district court. The Ninth Circuit found that the State of California had waived its immunity from such enforcement proceedings by voluntarily participating in the cooperative program. However, the court's determination that the Eleventh Amendment does not apply to administrative adjudications was not premised on the state's purported waiver of its immunity, but instead was grounded on a conclusion that sovereign immunity from suit applies only to tribunals that exercise judicial power. 119 F.3d at 769.

nessee's argument that the immunity applies "to executive branch adjudicatory bodies, is unsupported by any authority and runs counter to the interpretation consistently given the [Eleventh] amendment by the Supreme Court." 979 F.2d at 1166.

Similarly, the Eighth Circuit in *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981), declined to apply sovereign immunity in the administrative setting. While not specifically addressing agency adjudications like those heard by the Commission, but instead considering a Department of Labor investigation prompted by a private complaint against an arm of the State of Missouri, the Eighth Circuit nevertheless broadly held that "[t]he eleventh amendment bars *judicial* action, not action by Congress or the Executive Branch." 629 F.2d at 567 (original emphasis).

These three cases demonstrate that the Sixth, Eighth, and Ninth Circuits have declined to apply the Eleventh Amendment and the doctrine of state sovereign immunity to administrative bodies that do not exercise judicial power.[7] While these cases do not involve the 1984 Act, they all construe the Eleventh Amendment in relation to non-judicial administrative tribunals like the Commission.[8] The court of appeals in the present proceeding found that the doctrine of state sovereign immunity

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[7] In *Delaware Dep't of Health & Social Services v. United States Dep't of Education*, 772 F.2d 1123, 1138 (3rd Cir. 1985), the Third Circuit rejected, in *dicta*, the notion that the Eleventh Amendment has "any possible application to proceedings before" administrative panels.

[8] Although the decisions from the Sixth and Eighth Circuits pre-date this Court's ruling in *Seminole Tribe*, it is important to observe that *Seminole Tribe* addressed Congress' ability to vest in the Judicial Branch of the federal government the authority to hear private lawsuits against states. 517 U.S. at 72-73. The case did not involve Congress' authority to permit the Executive Branch to regulate certain state activities through the use of privately-initiated administrative adjudications. It is therefore doubtful whether *Seminole Tribe* would have had any effect on the decisions of the Sixth and Eighth Circuits, both of which recognize a clear distinction between Judicial Branch authority and Executive Branch power.

from suit does apply to "the adjudicative apparatus of federal agencies and commissions." Pet. App. 25a. This holding clearly conflicts with the above-described cases from the Sixth, Eighth, and Ninth Circuits.

We are aware of only one other case from a court of appeals in which sovereign immunity was discussed as having possible application to an administrative adjudication. That case is *Hensel v. Office of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994), where the Tenth Circuit addressed an appeal from an administrative hearing in a discrimination complaint against a state-run health center in which the sovereign immunity issue had been raised by the parties but had not been ruled upon by the Executive Office for Immigration Review's administrative law judge. Reliance on *Hensel* as precedent for finding sovereign immunity applicable to administrative proceedings is not compelling, because the Tenth Circuit assumed, with no discussion, that the administrative proceeding under the Immigration Reform and Control Act ("IRCA") was actually a lawsuit. The court used "suit" and "court" language despite the fact that the proceeding was held before an administrative law judge. *Hensel*, 38 F.3d at 508 (examining whether the IRCA "intended to subject the state to suit in federal court"). Thus, the existence of a conflict in principle as to the application of state sovereign immunity to non-judicial administrative tribunals may be demonstrated without reliance on the Tenth Circuit's ruling in *Hensel*.

B. *Alden v. Maine* should have no effect on the conflict in principle between the circuits

It might be argued that no circuit split exists because the above-described cases were decided before *Alden*. But this Court in *Alden* held that the doctrine of state sovereign immunity extends beyond the walls of Article III, not beyond the walls of a courtroom. In finding states immune from suit in their own courts, the Court based its reasoning on the fact that states had historically enjoyed immunity from such suits, and ruled

that the Constitution did not require them to surrender this immunity. 527 U.S. at 731. The Court in *Alden* made no reference to administrative adjudications, but instead applied sovereign immunity to a judicial body, albeit a judicial body not specifically mentioned in the Eleventh Amendment. 527 U.S. at 754. This simply does not address the application of sovereign immunity to an administrative agency like the Commission. The cases from the Sixth, Eighth, and Ninth Circuits should not be seen as having been overruled by *Alden*, and the Court should grant certiorari to resolve this important conflict.[9]

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.[10]

Respectfully submitted.

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JULY 2001

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[9] Furthermore, though it is difficult to see *Alden* as applying on its terms to this question because it addressed state courts and made no mention of administrative tribunals, the uncertainty around the issue would alone be reason to grant the petition for certiorari. See, *e.g.*, *Securities and Exchange Comm'n v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967) (the Court may grant certiorari to clarify the implications of a previous decision).

[10] This petition is filed pursuant to the Commission's independent litigation authority, 28 U.S.C. 2350(a). Additionally, by letter dated July 5, 2001, the Solicitor General authorized the Commission to file a petition for writ of certiorari on its own behalf in this case.

Supreme Court, U.S.
FILED

No. 01-46 JUL 10 2001

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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64 pp

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1481

SOUTH CAROLINA STATE PORTS AUTHORITY,
Petitioner,

v.

FEDERAL MARITIME COMMISSION;
United States of America, Respondents.

State of Maryland; State of Alabama; State of Arkansas; State of Connecticut; State of Delaware; State of Florida; State of Georgia; State of Iowa; State of Louisiana; State of Maine; State of Mississippi; State of Montana; State of Nevada; State of North Carolina; State of North Dakota; State of Oklahoma; State of Oregon; State of South Carolina; State of South Dakota; State of Virginia; State of West Virginia; National Association of Waterfront Employers, Amici Curiae.

Argued Jan. 22, 2001.

Decided March 12, 2001.

Before WILKINSON, Chief Judge, NIEMEYER, Circuit Judge, and HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Reversed and remanded with directions to dismiss by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge NIEMEYER and Judge HOWARD joined.

OPINION

WILKINSON, Chief Judge:

This case requires us to decide whether a state's sovereign immunity protects it from being brought before a federal administrative tribunal by a private party. We hold that the state's immunity prevents such a suit or proceeding.

South Carolina Maritime Services, Inc. (Maritime Services), a cruise ship company, filed a complaint with the Federal Maritime Commission (FMC) against the South Carolina State Ports Authority (SCSPA). The suit sought reparations and injunctive relief for alleged violations of the Shipping Act of 1984, 46 U.S.C. app. § 1701 et seq. (1994). The FMC held that state sovereign immunity does not extend to private complaints filed before a federal agency. Because a state's sovereign immunity is not so fleeting as to depend upon the forum in which the state is sued, the judgment of the FMC is reversed and the case is remanded with directions to dismiss it.

I.

Maritime Services operates a cruise ship, the M/V TROPIC SEA. Passengers may gamble on board the ship while it is in international waters. The South Carolina State Ports Authority has a policy of refusing to berth ships whose primary purpose is gambling. The SCSPA allows some ships that permit gambling to berth, but only so long as gambling is not their primary purpose. The SCSPA refused to give the M/V TROPIC SEA a berthing space at the port of Charleston because it claimed the ship's primary purpose was to facilitate gambling.

Maritime Services, believing that it was being singled out for unfair treatment, filed a complaint with the FMC under the Shipping Act of 1984. The Shipping Act regulates the oceanborne foreign commerce of the United States. The Act prohibits discrimination by carriers and terminal operators and allows the FMC to regulate any agreement involving oceanborne foreign commerce. *Id.* §§ 1701(l), 1703(a) & (b). Maritime Services alleged that the SCSPA, as a terminal operator, had violated the Shipping Act by unreasonably refusing to deal and by unreasonably preferring other cruise ship companies to the disadvantage of Maritime Services. *Id.* § 1709(b)(11) & (d)(3). The complaint asked for a cease and desist order, actual damages, interest, and attorney's fees.

The SCSPA's response raised, *inter alia*, the argument that South Carolina's sovereign immunity prohibits private parties from suing the SCSPA before a federal agency. In support, the SCSPA noted that in *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir.1995), this court held that the SCSPA is protected by South Carolina's sovereign immunity because it is an arm of the state. The ALJ agreed and dismissed the suit on sovereign immunity grounds. The FMC then reviewed the case on its own motion. In reversing the ALJ, the FMC held that sovereign immunity does not bar private suits against the states before federal agencies. The SCSPA now appeals.

II.

The doctrine of sovereign immunity predates the founding of our nation. *See* W. Blackstone, Commentaries on the Laws of England 234-35 (1765). And "[a]lthough the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." *Alden v. Maine*, 527 U.S. 706, 715-16, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 434-35, 1 L.Ed. 440 (1793) (Iredell, J., dissenting)).

Notwithstanding the presumed universality of this doctrine, the Supreme Court held in 1793 that a private citizen of South Carolina could in fact sue the State of Georgia without its consent. *Chisholm*, 2 U.S. at 420. Justice Iredell dissented,

contending that both before and after the adoption of the Constitution, the states maintained their sovereign right to be protected from suit without consent. *Id.* at 435-36, 448, 449-50 (Iredell, J., dissenting). The decision in *Chisholm* "fell upon the country with a profound shock" and was quickly overruled by the Eleventh Amendment. *Alden*, 527 U.S. at 720, 722, 119 S.Ct. 2240 (internal quotations omitted). The Eleventh Amendment provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although the literal text of the Amendment speaks only to suits filed by citizens of one state against another state, the Supreme Court held in *Hans v. Louisiana*, 134 U.S. 1, 21, 10 S.Ct. 504, 33 L.Ed. 842 (1890), that sovereign immunity barred a citizen from suing his own state without consent. This is because the principle of sovereign immunity derives not just from the Eleventh Amendment, but from the structure and background principles of the Constitution. *Hans*, 134 U.S. at 11-12, 10 S.Ct. 504. It is with these background principles in mind that the Supreme Court decided two recent cases concerning state sovereign immunity: *Seminole Tribe of Florida v. Florida*, 517 U.S.44,116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). These two decisions provide significant guidance on how to resolve the underlying dispute.

A.

The *Seminole Tribe* case involved the Indian Gaming Regulation Act (IGRA), 25 U.S.C. § 2710(d), enacted under the Indian Commerce Clause. U.S. Const. art. I, § 8, cl. 3. Pursuant to the IGRA, the Seminole Tribe of Florida asked a federal district court to order the State of Florida to negotiate with the Tribe in good faith.

The Supreme Court affirmed the dismissal of the Tribe's suit, holding that Congress could not, in the exercise of its Article I powers, abrogate a state's sovereign immunity in federal court. 517 U.S. at 73, 116 S.Ct. 1114. According to the Court, "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area ... that is under the exclusive control of the Federal Government." *Seminole Tribe*, 517 U.S. at 72, 116 S.Ct. 1114. Moreover, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* Noting that " [t]he Eleventh Amendment restricts the judicial power under Article III," the Supreme Court explained that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73, 116 S.Ct. 1114.

In reaching its decision, the Supreme Court held that the sovereign immunity principle is sufficiently strong that it transcends the literal text of the Eleventh Amendment and applies regardless of the type of relief sought. The Court noted that the Eleventh Amendment does not stand "'so much for what it says, but for the presupposition ... which it confirms.'" *Id.* at 54,116 S.Ct. 1114. (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991)). The presupposition is that "each State is a sovereign entity in our federal system" and that "'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual'" without consent. *Id.* (quoting *The Federalist No. 81*, p. 487 (C. Rossiter ed. 1961) (A. Hamilton)). Thus the Eleventh Amendment merely confirmed, rather than established, the structural principle of state sovereign immunity. Accordingly, the Court concluded that the " 'States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity

in the plan of the convention.'" *Id.* at 68, 116 S.Ct. 1114 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23, 54 S.Ct. 745, 78 L.Ed. 1282 (1934)).

With respect to the type of relief sought, *Seminole Tribe* held that the doctrine of sovereign immunity applies even if the suit against the state seeks no damages but only requests injunctive relief. According to the Court, "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity." *Id.* at 58, 116 S.Ct. 1114. This is because the "Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a State's treasury, it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Id.* (alteration in original) (internal quotations and citations omitted). Accordingly, the fact that the IGRA only authorized prospective injunctive relief was of no moment in determining the scope of Congress' abrogation authority.

B.

Alden v. Maine is the other recent sovereign immunity decision that informs our inquiry. A group of probation officers filed suit in federal court against the State of Maine. The officers alleged that the state had violated the Fair Labor Standards Act of 1938 (FLSA). *Alden*, 527 U.S. at 711, 119 S.Ct. 2240. While that suit was pending, *Seminole Tribe* was decided and the federal complaint was dismissed. *Id.* at 712, 119 S.Ct. 2240. The probation officers then filed the same action in state court because the FLSA authorized private state court actions against the states, regardless of consent. *Id.*

Just as *Seminole Tribe* held that state sovereign immunity transcends the type of relief sought, *Alden* held that the sovereign immunity of the states transcends the forum in which the state is sued. Thus, the Court held that sovereign immunity bars suits in state courts just as it does in federal courts. According to the Supreme Court, "the

powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Id.*

Alden explained clearly why state sovereign immunity applies regardless of the forum in which the private action is prosecuted. According to the Court, "[p]rivate suits against nonconsenting States ... present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties, regardless of the forum." *Id.* at 749, 119 S.Ct. 2240 (internal quotations and citations omitted). Compounding the harm is the fact that "[n]ot only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf." *Id.* Accordingly, *Alden* recognized that whether a state is entitled to sovereign immunity "does not turn on the forum in which the suits [are] prosecuted." *Id.* at 733, 119 S.Ct. 2240. Rather, sovereign immunity applies whenever a private individual attempts to sue a non-consenting state. *Id.*

In explicating this holding, *Alden* also reaffirmed the *Seminole Tribe* principle that state sovereign immunity extends beyond the text of the Eleventh Amendment. According to the Court, "[t]o rest on the words of the Amendment alone would be to engage in the type of a historical literalism" that has been rejected "since the discredited decision in *Chisholm*." *Id.* at 730, 119 S.Ct. 2240 (citing *Seminole Tribe*, 517 U.S. at 68, 116 S.Ct. 1114). In determining that sovereign immunity protected states from suits in their own courts, the Court found it irrelevant "that the Eleventh Amendment by its terms limits only '[t]he Judicial power of the United States.'" *Id.* (alteration in original). Rather, *Alden* recognized that state sovereign immunity is an overarching principle of the Constitution. *Id.* at 713, 119 S.Ct.

2240. Instead of focusing on the literal terms of the Eleventh Amendment, the Court looked at the historical underpinnings of the doctrine of sovereign immunity. This historical inquiry yielded *Alden's* conclusion that sovereign immunity bars any private suit against a non-consenting sovereign. "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Id.* at 715, 119 S.Ct. 2240. As Alexander Hamilton explained: "'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.'" *Id.* at 716-17, 119 S.Ct. 2240 (quoting The Federalist No. 81). Indeed, the antiquity of the doctrine is such that the Supreme Court found it "so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted." *Hans*, 134 U.S. at 16, 10 S.Ct. 504.

Moreover, it is equally well established that sovereign immunity bars not just lawsuits filed in courts of law, but rather all proceedings against a non-consenting sovereign. Thus, the Court noted the "'presumption that no anomalous and unheard of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the constitution was adopted.'" *Alden*, 527 U.S. at 727, 119 S.Ct. 2240 (quoting *Hans*, 134 U.S. at 18, 10 S.Ct. 504). This language, referring to "proceedings or suits," makes it clear that certain proceedings, while not suits, are nevertheless barred by the doctrine of sovereign immunity. *Alden* cautioned, however, that the defense of sovereign immunity "does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." *Id.* at 754-55, 119 S.Ct. 2240. Rather, the "States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design." *Id.* at 755, 119 S.Ct. 2240.

Alden outlined six exceptions to the doctrine of sovereign immunity. First, sovereign immunity does not bar a suit where the state has given consent. Second, states remain subject to suits brought by the Federal Government or by other states. Third, Congress retains the power to abrogate the sovereign immunity of the states pursuant to the Fourteenth Amendment's Section 5 enforcement power. Fourth, sovereign immunity does not bar private suits against municipal corporations or other lesser governmental entities. Fifth is the *Ex parte Young* exception, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which allows certain private suits against state officers if the suit seeks only injunctive or declaratory relief to remedy an ongoing violation of law. Sixth, state officers may be sued for money damages in their individual capacity, so long as the relief is sought from the officer personally. *Alden*, 527 U.S. at 755-57, 119 S.Ct. 2240.

C.

Seminole Tribe and *Alden* make clear that state sovereign immunity, while not absolute, is among the Constitution's foremost principles. This constitutional commitment to dual sovereignty is no radical idea. As the Supreme Court has repeatedly explained, embedded in the structure of the Constitution is the principle that a private party may not file a complaint against an unconsenting state. With these lessons firmly in mind, we turn to the merits of the claim before us.

III.

The FMC and the United States argue that despite *Seminole Tribe* and *Alden*, sovereign immunity for the South Carolina State Ports Authority is inappropriate in this case. They posit two primary reasons for the SCSPA's lack of sovereign immunity. First, they contend that the FMC is not a court and thus does not exercise the judicial power of the United States. Second, they argue that the proceeding in

front of the FMC is not a lawsuit. We address each contention in turn.

A.

The respondents FMC and the United States first assert that sovereign immunity does not apply in agency actions because agencies do not exercise the judicial power of the United States. *See* U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed...."). Since the FMC is an agency operating under the Executive Branch, and not a court, they argue that sovereign immunity is inapplicable in this case. They point out that the agency has no independent enforcement power.

The FMC and the United States contrast the powers exercised by the FMC here with the authority exercised by the Tax Court in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 111 S.Ct. 263, 115 L.Ed.2d 764 (1991). In *Freytag*, the Supreme Court held that the Tax Court, an Article I entity, "exercises its judicial power in much the same way as the federal district courts exercise theirs." *Id.* at 891, 111 S.Ct. 2631. Because the Tax Court is "an adjudicative body" that can, *inter alia*, subpoena witnesses, order production of documents, administer oaths, grant certain injunctive relief, order the Secretary of the Treasury to refund an overpayment, and punish contempts by fine or imprisonment, the Tax Court is a Court of Law despite being part of the Executive Branch. *Id.* Thus, "[b]y resolving those disputes" between taxpayers and the Government, "the court exercises a portion of the judicial power of the United States." *Id.*

The FMC and the United States argue that the differences between the Tax Court and the adjudicative authority of the FMC make it clear that only the former is a court. The Tax Court, unlike the FMC, can enforce its orders. 46 U.S.C. app. § 1713(c) (Attorney General may seek enforcement by the district court of a subpoena issued by the FMC); *id.* §

1712(e) (Attorney General may seek recovery in district court of civil penalties assessed by the FMC). Moreover, the Tax Court only decides cases, whereas the FMC also exercises executive, legislative, and administrative responsibilities. Finally, respondents point out that while the Tax Court does not make political decisions, the FMC does.

Whether the FMC is exercising the judicial power as outlined in *Freytag*, however, is irrelevant to the disposition of this case. The central lesson from *Freytag* is that adjudication by adversarial proceedings *can* exist outside the context of Article III. *Freytag*, 501 U.S. at 889, 111 S.Ct. 2631; *accord id.* (Congress has "wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals"); *id.* at 910, 111 S.Ct. 2631 (Scalia, J., concurring) ("It is true that Congress *may* commit the sorts of matters administrative law judges and other executive adjudicators now handle to Article III courts—just as some of the matters now in Article III courts could instead be committed to executive adjudicators."). The precise limits of what does or does not constitute a court under *Freytag* are less important than the overarching principle *Freytag* establishes—Article I tribunals may exercise the judicial power of the United States.

If Article I courts can indeed exercise the judicial power, it would seem anomalous to limit state sovereign immunity strictly to an Article III proceeding. *Alden* in fact confirms that state sovereign immunity "is not directly related to the scope of the judicial power established by Article III." *Alden*, 527 U.S. at 730, 119 S.Ct. 2240. Rather, it is a "separate and distinct structural principle" that "inheres in the system of federalism established by the Constitution." *Id.* And the Court has held that Congress can abrogate a state's sovereign immunity "only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." *Id.* at 731, 119 S.Ct. 2240 (quoting *Blatchford*, 501 U.S. at 781, 111 S.Ct. 2578).

No "compelling evidence" exists. To the contrary, *Alden* demonstrates that the founding generation understood the Constitution "to preserve the States' traditional immunity from private suits." 527 U.S. at 724, 119 S.Ct. 2240. It was the spectre of private suits against the states that mattered to the founders, not the forums in which those suits might happen to be brought. At the time of ratification, the states were concerned about private citizens filing complaints against them without their consent. They understood that being subjected to such proceedings would affront a "fundamental aspect of [their] sovereignty." *Id.* at 713, 119 S.Ct. 2240.

More practically, the states "'were heavily indebted as a result of the Revolutionary War. They were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like lower English lords, to suits in the courts of the "higher" sovereign.'" *Id.* at 716, 119 S.Ct. 2240 (quoting *Nevada v. Hall*, 440 U.S. 410, 418, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979)). "It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages." *Alden*, 527 U.S. at 750, 119 S.Ct. 2240. In order to ensure passage of the Constitution, "[t]he leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." *Id.* at 716, 119 S.Ct. 2240; *accord id.* at 716-18, 119 S.Ct. 2240 (citing founders such as Hamilton, Madison, and Marshall). The lesson from "the Constitution's structure, its history, and the authoritative interpretations" by the Supreme Court is unmistakable—an adversarial proceeding against a non-consenting state by a private party triggers sovereign immunity. *Id.* at 713, 119 S.Ct. 2240.

The United States nevertheless asserts that the federal government can create Article I tribunals by which it can subject unconsenting states to proceedings by private parties. But would the founders have countenanced a system by which Congress could have avoided all the strictures of sovereign immunity by creating different tribunals where state sovereign immunity was completely inapplicable? To ask the question is to answer it. The states' concerns with affronts to their dignity and to the possibility of having to answer for their war debts would not disappear because the forum magically changed from an Article III court to an Article I tribunal. And while the coordinate branches of the federal government have the broadest latitude in organizing themselves as they see fit, they cannot employ an administrative structure that allows an end-run around the Constitution. Sovereign immunity is not so hollow a concept as to prohibit proceedings in certain fora like a federal or state court while at the same time permitting a similar proceeding to take place under the auspices of a legislative court or an agency adjudication. Dual sovereignty posits a relationship of mutual respect between Congress and the states. It is not consistent with that relationship for Congress to subject an unconsenting sovereign to the coercive club of private actions regardless of the forum. *See id.* at 733, 119 S.Ct. 2240 ("The logic" of sovereign immunity decisions like *Seminole Tribe* "does not turn on the forum in which the suits were prosecuted.").

Alden makes clear that any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states would not have passed muster at the time of the Constitution's passage nor after the ratification of the Eleventh Amendment. Such an adjudication is equally as invalid today, whether the forum be a state court, a federal court, or a federal administrative agency.

B.

The FMC and the United States also insist that sovereign immunity does not apply because the Article I proceeding in this case is not a "suit in law or equity." U.S. Const. amend. XI. Rather, they argue that the administrative adjudication is merely a form of regulation, in which political appointees attempt to effectuate the intent of a statute. The

structure of the administrative proceeding, however, belies this point. Whether the proceeding is formally called an administrative action, a lawsuit, or an adjudication does not matter. The fundamental fact, which respondents cannot escape, is that this proceeding requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state.

It is important to examine the precise nature of this proceeding, and to describe what it is really like. The Shipping Act sets forth a regime by which "any person" may bring a formal "complaint alleging a violation" of the Act. 46 U.S.C. app. § 1710(a). The complaint may ask for "reparation for any injury caused to the complainant." *Id.* The party named in the complaint must either "satisfy [it] or answer it in writing." *Id.* § 1710(b). The Act then mandates that if the complaint is not satisfied (i.e., settled), "the Commission *shall* investigate it in an appropriate manner and make an appropriate order." *Id.* (emphasis added). The Commission, "upon complaint or upon its own motion, may" also investigate "any conduct or agreement that it believes may be in violation of " the Act. *Id.* § 1710(c).

The Act also provides that in "investigations and adjudicatory proceedings," any party may utilize "depositions, written interrogatories, and discovery procedures." *Id.* § 1711(a). To the extent practicable, the rules for these proceedings "shall be in conformity with the rules applicable in civil proceedings in the district courts of the United States." *Id.* The FMC may also use the subpoena power to "compel the attendance of witnesses and the production of books, papers, documents, and other evidence." *Id.* If a party does not comply with a nonreparation order or with a subpoena, the Attorney General of the United States "may seek enforcement by a United States district court having jurisdiction over the parties." *Id.* § 1713(c). If the Commission orders reparation, "the person to whom the award was made may seek enforcement of the order in a United States district court having jurisdiction over the parties." *Id.* § 1713(d)(1).

When a party files a formal complaint under 46 U.S.C. app. § 1710(a), the investigation takes the form of an adjudication. *See* 46 C.F.R. § 502.61 (2000). ALJs are the presiding officers for the initial adjudication. *Id.* § 502.223. The ALJ "designated to hear a case shall have authority" to, *inter alia*, "sign and issue subpenas [sic]", "take or cause depositions to be taken," "delineate the scope of a proceeding," "hear and rule upon motions," "administer oaths and affirmations," "examine witnesses," "rule upon offers of proof," "act upon petitions to intervene," "hear oral argument at the close of testimony," "fix the time for filing briefs, motions, and other documents, " and "dispose of any other matter that normally and properly arises in the course of the proceedings." *Id.* § 502.147. Parties may, *inter alia*, depose witnesses, *id.* § 502.203; submit interrogatories, *id.* § 502.205; and submit requests for admission from opposing parties, *id.* § 502.207. The FMC reviews the ALJ's decision if a party requests an appeal or on the Commission's own initiative. *Id.* § 502.227.

The proceeding thus walks, talks, and squawks very much like a lawsuit. Its placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication. The FMC and the United States argue, however, that despite the fact that the ALJ adjudicates the "case," *id.* § 502.147, and that the filing of a complaint necessarily "commence[s]" a "proceeding," *id.* § 502.61, the adjudication is in reality merely a form of regulation. The FMC and the United States contend that the agency simply uses adjudication as a means of implementing policy. The proceeding in their view is nothing more than an investigation of the merits of the claim. Indeed, they point out that the statute itself speaks in terms of "investigation." 46 U.S.C. app. § 1710(b). The FMC and the United States further maintain that the fact that only three commissioners of the FMC may come from the same party confirms that the agency's judicial function is only a means to implement its legislative objectives.

The adjudication, however, is just that—an adjudication. An impartial officer presides in an adversarial proceeding to

determine the rights and responsibilities of different parties. It is true that the commissioners may review the ALJ's decision. Nevertheless, this review is still impartial. *See* 5 U.S.C. § 554(d) (requiring separation of functions between adjudication and prosecution in administrative hearings); 46 C.F.R. § 502.224 ("The separation of functions as required by 5 U.S.C. § 554(d) shall be observed in proceedings" under the Shipping Act). Moreover, the ALJ issues subpoenas, authorizes depositions, hears witnesses, and otherwise conducts the proceedings in a judicious manner. Administrative law judges are what the name says they are—judges.

Indeed, the Supreme Court has recognized that ALJs are judges who decide cases. In *Butz v. Economou*, 438 U.S. 478, 511-14, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Court extended absolute judicial immunity to ALJs precisely because ALJs perform judicial acts. The Court held that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." *Butz*, 438 U.S. at 512-13, 98 S.Ct. 2894. So as to leave no doubt, the Court noted that the "conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court." *Id.* at 513, 98 S.Ct. 2894. It did not matter that the ALJs were "employees of the Executive Branch." *Id.* at 511, 98 S.Ct. 2894. "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Id.*

The ALJ is thus not merely an alternate means of policy implementation. Rather, "the role of the modern federal hearing examiner or administrative law judge ... is 'functionally comparable' to that of a judge." *Id.* at 513, 98 S.Ct. 2894. Like the situation in *Butz*, the judges and commissioners in the FMC independently judge the evidence before them. As the *Butz* Court stated, "the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before

him, free from pressures by the parties or other officials within the agency." *Id.* Although Article I adjudication undoubtedly differs from Article III adjudication, "federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process." *Id.* (citing certain requirements of the Administrative Procedure Act, 5 U.S.C. §§ 554-557).

The FMC and the United States maintain, however, that the agency adjudication is merely an empty shell because the agency itself has no enforcement power. Only the Attorney General, they emphasize, has the discretion to enforce the FMC's non-reparation orders in district court. 46 U.S.C. app. § 1713(c). This argument, however, downplays the significance of the agency's own proceeding. The FMC and the United States ignore the fact that the Commission *must* hear all complaints filed with it. *Id.* § 1710(b). The Attorney General's discretion at the back end of the process simply does not help the unconsenting state up front. *See Seminole Tribe*, 517 U.S. at 58, 116 S.Ct. 1114. Moreover, it is difficult to believe that the agency adjudication is so meaningless as to permit a private party to subject an unconsenting state to agency proceedings *because of* the adjudication's very emptiness.

It is true that under the Act, a state may choose to ignore a subpoena, an order, or a judgment. 46 U.S.C. app. § 1713(c). Yet a judgment or a subpoena against a state is a powerful thing, if not legally, then certainly politically. All parties, and certainly political entities such as states, have an interest in avoiding the stigma that attaches even to an unenforceable default judgment. Moreover, a state offends an agency that has plenary jurisdiction over its ports at its own peril. Indeed, the FMC may fine a state up to $25,000 per day for failure to comply with a Commission order. *Id.* § 1712(a). And the United States, through the Attorney General, can enforce these penalties in federal district court. *Id.* § 1712(e) (district court shall enforce the order unless it is "not regularly made or duly entered"). Furthermore, the ALJ could

order (although not force) the state to be available for depositions, to answer interrogatories, and to produce documents. That the state may choose not to comply with the order does not change the fact that the state has already suffered an indignity to its sovereignty. *See Alden*, 527 U.S. at 713, 119 S.Ct. 2240. The proverbial egg has already been broken.

Furthermore, the idea that a state would explicitly ignore any order of the federal government does not do justice to our system of federalism. State officers, no less than federal ones, take an oath to support and defend the Constitution and the laws of the United States. *Id.* at 715, 119 S.Ct. 2240. The Supremacy Clause, of course, makes it clear that state officials have a duty to obey and enforce those same laws. *See, e.g., Testa v. Katt*, 330 U.S. 386, 391, 67 S.Ct. 810, 91 L.Ed. 967 (1947) ("[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people."). In short, we cannot base our opinion on the lack of FMC enforcement power because doing so would assume that state officers are unwilling on their own to obey an order of the United States. While enforcement power may be relevant to deciding whether a legislative court possesses the "judicial power" under Article III and *Freytag*, the question of whether sovereign immunity applies depends only on whether a private party can subject an unconsenting state to an adversarial proceeding. The Shipping Act, as well as Supreme Court decisions interpreting the role of administrative judges, underscores the fact that sovereign immunity applies to this agency adjudication.*

* The United States also contends that the Supreme Court's "public rights" doctrine negates the suggestion that an agency adjudication is a judicial action. Invoking the public rights doctrine, however, does not change the fact that a private party simply cannot commence an adversarial proceeding against an unconsenting state. Moreover, even in the public rights context the Supreme Court has been skeptical of allowing Article I tribunals to exceed the constitutional jurisdiction of Article III courts. *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458

(Continued...)

IV.

A.

Our holding that state sovereign immunity applies to agency adjudications does not end the inquiry. The Supreme Court has identified six exceptions to the doctrine of state sovereign immunity. *See supra* Section II.B. We address each in turn.

1.

The first exception to sovereign immunity is when the state gives its consent to suit. *See, e.g., Alden*, 527 U.S. at 755, 119 S.Ct. 2240. This exception, of course, permits a state to redress the grievances of the complainant. However, it does so in a way that allows states to decide whether they want to be subject to a particular suit or class of suits. South Carolina has not given its consent to this lawsuit. It has not passed any law evincing an intent to be sued by a private party in these cases. Nor has it acquiesced to being sued in this particular case. Consequently, the consent exception does not apply to the case at bar.

2.

The second exception is for cases brought against a state by the United States or by other states. *See, e.g., id.* at 755-56, 119 S.Ct. 2240; *Principality of Monaco*, 292 U.S. at 328, 54

(...continued)

U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (plurality opinion); *Glidden v. Zdanok*, 370 U.S. 530, 544-52, 582 S.Ct. 1459, 8 L.Ed.2d 671 (1962); *Crowell v. Benson*, 285 U.S. 225, 52 S.Ct. 285, 76 L.Ed. 598 (1932); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 15 L.Ed. 372 (1856); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 7 L.Ed. 242 (1828). Because an Article III court would not have jurisdiction due to state sovereign immunity, these and other cases suggest that sovereign immunity would also bar Congress from permitting a federal agency to force a state to defend a claim against a private party. Thus, even in the absence of *Alden*, sovereign immunity would likely bar the FMC from adjudicating Maritime Service's complaint against the SCSPA.

S.Ct. 745. A suit "commenced and prosecuted against a State in the name of the United States ... differs in kind from the suit of an individual" in that the former was specifically contemplated in the design and framework of the Constitution. *Alden*, 527 U.S. at 755, 119 S.Ct. 2240. Suits brought by the United States require the exercise of political responsibility. *Id.* at 756, 119 S.Ct. 2240. They are less prone to be carried out solely to advance the agenda of a single individual. *Id.* Purely private suits, by contrast, lack this political constraint. The FMC and the United States argue that the discretion exercised by the Attorney General in deciding to enforce a Commission order transforms a proceeding by a private party into a discretionary action by the government. We disagree.

As previously discussed, the agency must hear all claims filed under 46 U.S.C. app. § 1710(a). It also has the ability to investigate cases upon its own motion, or upon the filing of a complaint. *Id.* § 1710(c). Indeed, under the Shipping Act and many other acts, the federal government may investigate a claim and simply bring a complaint in its own name. *See, e.g., Kimel v. Florida Board of Regents*, 528 U.S. 62, 78, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (an agency can bring an action against a state under the ADEA even though a private individual cannot do so); *see also EEOC v. Wyoming*, 460 U.S. 226,243,103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) (agency brings suit against state under the ADEA); *EEOC v. State of Illinois*, 69 F.3d 167, 168 (7th Cir. 1995) (agency brings action against state on behalf of school teachers); *Reich v. Alabama Dept of Cons. & Nat. Resources*, 28 F.3d 1076, 1078 (11th Cir.1994) (Secretary of Labor brings action against state agency under the FLSA). In those cases, however, the named party would be the federal government, not a private party. This is not such a case. Here, a private party filed a complaint against an unconsenting state. The FMC had no choice but to adjudicate this dispute. The federal government must exercise "political responsibility for *each suit* prosecuted against a State." *Alden*, 527 U.S. at 756, 119 S.Ct. 2240 (emphasis

added). This responsibility was lacking in the case at bar. Consequently, the complaint was not brought by the federal government.

3.

The third exception to state sovereign immunity is for cases brought pursuant to Congress' enforcement power under Section Five of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 453, 96 S.Ct. 2666,49 L.Ed.2d 614 (1976); *see also Board of Tr. of the Univ. of Alabama v. Garrett*, 531 U.S. ———,121 S.Ct. 955, 968, 148 L.Ed.2d 866 (2001). The Fourteenth Amendment "required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution" and "fundamentally altered the balance of state and federal power." *Alden*, 527 U.S. at 756, 119 S.Ct. 2240 (internal quotation marks omitted). Respondents do not contest that the Shipping Act was enacted pursuant to Congress' Article I powers, as opposed to Congress' Section Five power. Thus, this exception does not apply to the case at bar.

4.

The fourth exception is for suits brought against lesser entities like municipal corporations that are not an arm of the state. *See Aiden*, 527 U.S. at 756, 119 S.Ct. 2240. The South Carolina State Ports Authority is indisputably an arm of the state itself. *Ristow*, 58 F.3d at 1053 ("[T]he Ports Authority, from an Eleventh Amendment perspective, is the alter ego of the State of South Carolina."). Consequently, this exception is inapplicable.

5.

The fifth exception to sovereign immunity is that in certain circumstances a private party may sue state officers in their official capacity to prevent ongoing violations of the law. *See Ex parte Young*, 209 U.S. at 123, 28 S.Ct. 441; *see also*

Seminole Tribe, 517 U.S. at 73, 116 S.Ct. 1114. This exception is irrelevant to the case at bar, as the private party brought the complaint for both legal and equitable relief against the State Ports Authority itself.

6.

Finally, sovereign immunity does not prevent an individual from suing state officers in their individual capacity for ultra vires conduct fairly attributable to the officers themselves. *Alden*, 527 U.S. at 757, 119 S.Ct. 2240. This exception is likewise inapplicable to the instant case.

B.

The FMC and its amicus urge us to create another exception to sovereign immunity, however. They argue that the federal interest in uniform regulation of maritime matters is sufficient reason to deny the states sovereign immunity over matters in front of the FMC. They argue that the Constitution itself, as well as Supreme Court cases, recognize the important federal interest in maintaining "a uniformity of regulation for maritime commerce." *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000). In effect, the FMC and its amicus would have us hold that South Carolina consented to suits in matters affecting maritime commerce when it ratified the Constitution.

The Supreme Court in *Seminole Tribe* made clear that a strong federal interest in a particular subject matter cannot determine the application of sovereign immunity to a lawsuit. Indeed, the *Seminole Tribe* Court declared that "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area ... that is under the exclusive control of the Federal Government." *Seminole Tribe*, 517 U.S. at 72, 116 S.Ct. 1114 *Seminole Tribe* itself involved just such a matter—the Constitution gives Congress exclusive control over the regulation of Indian commerce. *Id.* Nevertheless, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states." *Id.* Likewise, the fact that the Constitution assigns the federal government a primary role in the regulation of maritime commerce does not mean that Congress can authorize a private party to bring a complaint against an unconsenting state. Once sovereign immunity applies, the only exceptions are those recognized in *Alden*.

The federal government of course retains broad powers to regulate maritime matters. The FMC can bring a complaint in its own name. 46 U.S.C. app. § 1710(c). The FMC can, *inter alia*, bring suit in district court to enjoin conduct in violation of the Act. *Id.* § 1710(h). The FMC can investigate alleged violations of the Act upon its own initiative or upon information supplied by a private party. *Id.* § 1710(c). The FMC may issue a cease and desist order if its investigation uncovers a violation of the Act. *Id.* § 1713. "Whoever" violates the Act or an FMC order "is liable to the United States for a civil penalty." *Id.* § 1712(a). Marine terminal operators like the South Carolina State Ports Authority must "establish, observe, and enforce just and reasonable regulations and practices....." *Id.* § 1709(d)(1). The FMC can issue rules and regulations necessary to carry out the provisions of the Act. *Id.* § 1716. Indeed, if Congress so chose it could regulate all matters affecting ocean-borne commerce. U.S. Const. art. I., § 8, cl. 3; *United States v. Lopez*, 514 U.S. 549, 558, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Commerce Clause allows direct regulation of the channels of interstate commerce).

These and other methods show that disallowing private suits against unconsenting states will not vitiate the strong federal interest in regulating maritime commerce. The fact that sovereign immunity applies to private proceedings means only that the federal government, not a private party, must vindicate the federal interest when a state is involved.

If the FMC needs more resources to ensure compliance by state agencies, Congress may of course authorize additional funds. This process ensures that any federal interest is protected in a politically accountable manner.

The FMC nevertheless argues that exempting states from having to respond to private complaints would give public maritime operators a competitive advantage over private maritime facilities. But we are not deciding this case based on maritime efficiencies or economic advantage. Rather, it is the structure of the Constitution that we are enforcing. If sovereign immunity confers upon state ports authorities some advantages that private ports authorities do not have, it is for the fundamental reason that the Constitution treats states differently. States are not just "mere prefectures or corporations." *Alden*, 527 U.S. at 758, 119 S.Ct. 2240. They are sovereign entities which by definition have certain advantages that private actors do not have. Any competitive advantage that a state might have is not enough to justify treating states in a different manner than the Constitution specifies. Moreover, in this case it is unclear whether the states will be at a competitive advantage. The federal government retains numerous enforcement powers and under the Supremacy Clause state officers must follow the Constitution and laws of the United States.

In short, the federal government itself may "deem the case of sufficient importance to take action against the State." *Alden*, 527 U.S. at 759-60, 119 S.Ct. 2240. "Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States." *Id.* at 758, 119 S.Ct. 2240. What Congress simply cannot do under its Article I power is subject an unconsenting state to an adversarial proceeding brought by a private party.

V.

Sovereign immunity is not some outdated concept, an ancient appendage to the Constitution itself. Rather, respect

for state sovereignty enables the states to best fulfill their continuing roles and responsibilities within our federal system. Sovereign immunity applies to proceedings brought in any forum by a private party against a non-consenting state. The history, the text, and the structure of the Constitution confirm that under its Article I powers, Congress cannot authorize private parties to haul unconsenting states before the adjudicative apparatus of federal agencies and commissions.

"The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Alden*, 527 U.S. at 748, 119 S.Ct. 2240 (quoting *In re Ayers*, 123 U.S. 443, 505, 8 S.Ct. 164, 31 L.Ed. 216 (1887)). To hold otherwise would destroy the delicate equilibrium that is dual sovereignty.

For the foregoing reasons, the judgment of the Federal Maritime Commission is reversed and the case is remanded with directions to dismiss it.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

APPENDIX B

March 23, 2000

FEDERAL MARITIME COMMISSION

DOCKET NO. 99-21

SOUTH CAROLINA MARITIME SERVICES, INC.

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

ORDER REVERSING THE ADMINISTRATIVE LAW JUDGE'S ORDER AND REMANDING FOR FURTHER PROCEEDINGS

BY THE COMMISSION: *(Harold J. Creel, Jr., Chairman; Joseph Brennan, Antony M. Merck, John A. Moran, and Delmond J.H. Won, Commissioners)*

BACKGROUND

This proceeding began with the filing of a complaint before the Federal Maritime Commission ("Commission" or "FMC") on October 25, 1999, by South Carolina Maritime Services, Inc. ("Maritime Services"), a South Carolina corporation engaged in the operation of passenger vessels, against the South Carolina State Ports Authority ("SCSPA"). In its complaint, Maritime Services asserted that SCSPA refused to give berthing space at Charleston, South Carolina, to Maritime Services' vessel, the M/V TROPIC SEA, which permits gambling activities on board when the vessel is in international waters. The denial of berthing space was due

to SCSPA's purported policy of refusing to berth ships whose primary purpose is gambling. Maritime Services averred that SCSPA did provide berthing to another cruise operator, Carnival Cruise Lines, whose vessel, the M/S INSPIRATION, allegedly provided gambling services. Because of this apparently disparate treatment, Maritime Services claimed that SCSPA violated section 10(b)(10) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. § 1709(b)(10), by unreasonably refusing to deal, and section 10(d)(4), 46 U.S.C. app. § 1709(d)(4), by unduly and unreasonably preferring Carnival, and unduly and unreasonably prejudicing or disadvantaging Maritime Services. Maritime Services asked for a cease and desist order and for compensation for "actual injuries caused by [SCSPA]'s discriminatory practices, as well as interest and reasonable attorneys fees." Complaint at 10.

On November 16, 1999, SCSPA filed an Answer to the Complaint. In its Answer, SCSPA raised the affirmative defense that "[t]he Eleventh Amendment of the U.S. Constitution prohibits suits by private parties for reparations against" a state agency like SCSPA. Answer at 8.

The case was assigned to Chief Administrative Law Judge Norman D. Kline ("ALJ"). Reviewing a motion to dismiss filed by SCSPA and Maritime Services' response, the ALJ dismissed the case based on his belief that SCSPA, as an arm of the State of South Carolina, is immune from complaint proceedings brought before the Commission under the doctrine of sovereign immunity. On February 2, 2000, the Commission, on its own motion, determined to review the ALJ's decision to dismiss the case. For the reasons set forth below, we believe the ALJ erred, and therefore reverse his decision and remand the case for further proceedings.

PROCEEDINGS BEFORE THE ALJ

After filing its Answer, SCSPA filed a Motion to Dismiss, alleging several grounds for dismissing the complaint. Of these, the ALJ considered and based his ruling only upon SCSPA's argument that it is an agency of the State of South Carolina and therefore immune from suit by private parties under the doctrine of sovereign immunity. Motion at 14-17.

In its Response to the Motion to Dismiss, Maritime Services addressed the various grounds for dismissal, and averred, *inter alia*, that SCSPA is not immune from suit under the doctrine of sovereign immunity. Response at 8-9.

On January 5, 2000, the ALJ granted the Motion to Dismiss, explaining that "recent Supreme Court decisions interpreting the 11th Amendment and State sovereign immunity from private suits plus a decision by the U.S. Court of Appeals for the Fourth Circuit holding that SCSPA is an 'arm of the State' and therefore entitled to the 11th Amendment immunity from private suits require that the instant complaint be dismissed." ALJ Order at 11.[1] He went on to hold that the only method for the Commission to inquire into the alleged violations of the Act in this case would be by Commission-initiated investigation.

DISCUSSION

Neither party appealed the ALJ's decision to the full Commission. Ordinarily, when no party files an appeal from an ALJ's decision to dismiss a case, the ALJ's ruling becomes the Commission's decision 30 days after its issuance, under Rule 227(c), 46 C.F.R. § 502.227(c). However, given the importance of the sovereign immunity question to the Commission's ability to determine whether state-operated ports are acting in compliance with the provisions of the Shipping Act, we decided to review the ALJ's ruling. Because the ALJ dismissed the complaint on sovereign immunity jurisdictional grounds, it is necessary for the

[1]The Fourth Circuit case referred to by the ALJ is *Ristow v. South Carolina State Ports Authority*, 58 F.3d 1051 (4th Cir. 1995).

Commission to determine whether such dismissal was correct — in other words, whether state sovereign immunity from private suits extends to proceedings before this agency.[2]

A. *The Doctrine of Sovereign Immunity*

In 1793, the U.S. Supreme Court ruled that Article III of the Constitution permitted a private citizen of another state to sue the State of Georgia in court without its consent. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The Eleventh Amendment was passed shortly thereafter, with the purpose of overturning the Court's determination in *Chisholm*. *See generally Alden v. Maine*, 119 S.Ct. 2240 (1999) (discussing the history of the ratification of the Eleventh Amendment). The explicit language of the Amendment forbids a citizen of one state from suing another state without that state's consent. The Amendment says that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens *of another State*, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI (emphasis added). However, in *Hans v. Louisiana*, 134 U.S. 1 (1889), the Court ruled that the doctrine of state sovereign immunity extends beyond the linguistic boundaries of the Eleventh Amendment, and forbade a suit against a state by

[2]It is clear that the SCSPA is a "person" under 46 U. S.C. app. § 1702, and thus subject to the Shipping Act's requirements. In *California v. United States*, 320 U.S. 577, 585-6 (1944), the Supreme Court ruled, under identical language in the Shipping Act's predecessor statute (the Shipping Act, 1916), that "with so large a portion of the nation's dock facilities ... owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *See also Reno v. Condon*, 120 S.Ct. 666 (2000) (Federal government may regulate commercial activities of state entities).

a citizen of that same state in Federal court in a case involving a question of Federal law. Subsequent decisions also "rejected similar requests to conform the principle of sovereign immunity to the strict language of the Eleventh Amendment." *Alden*, 119 S.Ct. at 2254. "These holdings reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Id.* Thus, our discussion here is not limited to the text of the Eleventh Amendment, but rather addresses the broader doctrine of sovereign immunity, as it has been developed and enunciated by the Supreme Court.

Based on his reading of numerous Supreme Court cases, the ALJ held that "it is irrational to argue that an agency like the Commission ... is free to disregard the 11th Amendment or its related doctrine of State immunity from private suits." ALJ Order at 20. He also ruled that there is "no significance to an argument that the doctrine of 11th Amendment State sovereign immunity from private suits does not extend to administrative proceedings." *Id.*

However, the Supreme Court has defined the terms of state sovereign immunity, and this definition does not extend to administrative proceedings. All of the recent Supreme Court cases addressing state sovereign immunity involve proceedings against states in judicial tribunals, not before administrative agencies. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court held that the Indian Commerce Clause does not grant Congress the authority to abrogate a state's sovereign immunity from suit in Federal district court under the Indian Gaming Regulatory Act. The Court specifically limited its inquiry to the issue of whether Congress could "expand the jurisdiction of the Federal courts beyond the bounds of Article III" of the Constitution. *Id.* at 65. The Court's discussion in *Seminole Tribe* is limited to the subject of district court

jurisdiction over states, and no mention of or analogy to administrative proceedings is made.[3]

In *Alden*, the Court ruled that the Constitution's Interstate Commerce Clause does not grant Congress the authority to subject nonconsenting states to private suits for damages in state courts under the Fair Labor Standards Act.[4] The Court noted that the "separate and distinct structural principle" of sovereign immunity "is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution." *Alden*, 119 S.Ct. at 2255. The Court also stated that it has "often described the States' immunity in sweeping terms, without reference to whether the suit was prosecuted in state or federal court." *Id.* at 2262. While the Court recognized that sovereign immunity arises from the "system of federalism," and not from the mere text of the Eleventh Amendment, it nevertheless described such immunity only in terms relating to the possibility of "suit ... in state or federal court." *Id.* The remainder of the recent sovereign immunity cases address suits in Federal court. *See College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 119 S.Ct. 2219 (1999) (Congress cannot seek constructive waivers of sovereign immunity from states for suit in Federal court under the Trademark Remedy Clarification

[3]A recent circuit court opinion, rendered after *Seminole Tribe*, agrees with this analysis. *See Premo v. Martin*, 119 F.3d 764, 769 (9th Cir. 1997), *cert. denied*, 522 U.S. 1147 (1998) ("the Amendment on its face limits only the authority of Article III courts."). Cases decided before *Seminole Tribe* reached similar results. *See, e.g., Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981) ("Petitioner, however, cites no case law for the proposition that the eleventh amendment is any bar to administrative action, and we reject that position. The eleventh amendment bars judicial action, not action by Congress or the executive branch.").

[4]The Court characterized the issue of whether the Federal government can abrogate state sovereign immunity from suit in the state's own courts as "a question of first impression." *Alden*, 119 S.Ct. at 2260.

Act/Trademark Act of 1946); *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S.Ct. 2199 (1999) (Congress lacks authority under section 5 of the Fourteenth Amendment to abrogate state sovereign immunity from suit in Federal court under the Patent and Plant Variety Protection Remedy Clarification Act); *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000) (Congress lacks authority under section 5 of the Fourteenth Amendment to abrogate state sovereign immunity from suit in Federal court under the Age Discrimination in Employment Act). *See generally The Supreme Court-Leading Cases*, 113 Harv. L. Rev. 200-233 (1999).

The doctrine of state sovereign immunity, even freed from the linguistic boundaries of the Eleventh Amendment, is meant to cover proceedings before judicial tribunals, whether Federal or state, not executive branch administrative agencies like the Commission. There is no compelling reason offered by either the ALJ or SCSPA to extend the reach of the Supreme Court's holdings in *Seminole Tribe* and *Alden*, and thereby nullify the Commission's jurisdiction over state ports, which jurisdiction has been in place for decades. The Shipping Act of 1984, and the Shipping Act, 1916[5] before it, illustrate Congress's decision that the regulation of ports, whether publicly or privately owned, is essential to protecting the nation's oceanborne commerce. Commission jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports. Accordingly, the Commission has in the past rebuffed attempts to restrict its jurisdiction over public port authorities. *See, e. g., James J. Flanagan Shipping Corporation d/b/a James J. Flanagan*

[5]The Shipping Act, 1916, which was replaced in most respects by the Shipping Act of 1984, was the statute the Commission and its predecessor agencies administered for decades. *See supra* at 4-5 n.2. The provisions of the 1916 Act not replaced by the passage of the 1984 Act were subsequently abolished by the Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 8033 (1995).

Stevedores v. Lake Charles Harbor and Terminal District and Lake Charles Stevedores, Inc., 27 S.R.R. 1123, 1130 (1997) ("that the Port presumably acts in the public interest does not shield it from the Commission's scrutiny.").

A private cause of action against an arm of the state brought before an administrative agency, because it invokes the remedial powers of the Executive branch, is in many respects more analogous to a Federal investigation than it is to a suit brought by a private party before a Federal or state court. For instance, section 11(b) of the Shipping Act provides that if a complainant in a Commission proceeding "is not satisfied, the Commission shall investigate [the complaint] in an appropriate manner and make an appropriate order." 46 U.S.C. app. § 1710(b). The Commission is also authorized to initiate investigations on its own motion, as a further weapon in its regulatory arsenal. Commission investigations, and private complaint proceedings, are part of a unified system of regulation created by Congress under the Shipping Act. It is important to note that the complaint case, as a regulatory tool, is not fungible with the right to file suit against a party in court. *See National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n*, 59 F.3d 1281 (D.C. Cir. 1995) (agency adjudications are not Article III court proceedings); *Chavez v. Director, Office of Workers Compensation Programs*, 961 F.2d 1409 (9th Cir. 1992) (same); *Ecee, Inc. v. Federal Energy Regulatory Comm'n*, 645 F.2d 339 (5th Cir. 1981) (same); *see also Tennessee Dept of Human Services v. U.S. Dept of Education*, 979 F.2d 1162 (6th Cir. 1992) (Eleventh Amendment does not apply to administrative agencies). A private complainant may not bring court action regarding alleged violations of the Shipping Act, as the FMC's jurisdiction over any such alleged violations is exclusive. *See Government of Guam v. American President Lines*, 28 F.3d 142 (D.C. Cir. 1994) (no implied private cause of action in court under the Shipping Act, 1916); *see also D.L. Piazza Co. v. West Coast Line, Inc.*, 210 F.2d 947 (2nd Cir.), *cert. denied*, 348 U.S. 839 (1954). This further emphasizes the unitary nature of the regulatory scheme created by the Shipping Act, as all original

determinations as to whether the Act has been violated, whether initiated by private complaint or by Commission investigation, are made by the Commission.[6]

For these reasons, we have chosen to reverse the ALJ's decision dismissing the present case, and hold that the doctrine of sovereign immunity does not bar complaints against state-run ports.[7]

B. *Whether Commission Reparations Awards are Enforceable*

The ALJ also noted that "the Commission cannot enforce its orders without the aid of the federal courts," and that, under sovereign immunity grounds, such enforcement might be impossible. ALJ Order at 21. It is true that, under section 14(d) of the Shipping Act, a party which has secured a reparations award by Commission order may "seek enforcement of the order in a United States district court having jurisdiction of the parties." 46 U.S.C. app. § 1713(d). The ALJ appears to have concluded that such enforcement would be impossible because, even if the Commission retained jurisdiction over a state-operated port, a district court would not have jurisdiction to order the enforcement of a reparations award. The ALJ assumed that the port would enjoy sovereign immunity from an enforcement proceeding. For this reason, the ALJ wondered, "what federal court would take jurisdiction of a private suit for enforcement of a reparations award that would have to be paid out of the State treasury?" ALJ Order at 21 n.8.

We note that review of the Commission's determinations awarding reparations to private complainants against state

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[6] *C.f., United States v. Locke*, 120 S.Ct. 1135 (2000) (recognizing a Federal interest in maintaining "a uniformity of regulation for maritime commerce.").

[7] Because it is not necessary to a resolution of the sovereign immunity question, we express no opinion regarding whether SCSPA is in fact an arm of the State of South Carolina.

port authorities is available in the courts of appeals pursuant to the Hobbs Act, 28 U.S.C. § 2342. Such review is not an initial suit by a citizen against a state under Article III, and is not a situation in which sovereign immunity would be implicated. Entities like SCSPA, if found by the Commission to be in violation of the Shipping Act, may petition the courts of appeals for review. The courts of appeals retain jurisdiction "to determine the validity of" orders issued by the Commission. 28 U.S.C. § 2342. The determination of the validity of a Commission order is a review of administrative action, not a suit against a state. *See, e.g., Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (setting forth the standards for review of an agency's interpretation of the statute it administers). Sovereign immunity would not preclude appellate review of a Commission order.

The possibility of bringing a cause of action against a port in district court to enforce a reparations award may be said to be analogous to Hobbs Act review in the courts of appeals. The role of the district court, pursuant to section 14 of the Shipping Act, is to permit a party holding a reparations award to seek "enforcement" of the order. Section 14 states that "the findings and order of the Commission shall be prima facie evidence of the facts therein stated." Such a proceeding is thus not an original *suit* against a state entity implicating Article III jurisdictional authority, but instead, like Hobbs Act review in the courts of appeals, is court *review* of a Federal agency's order.[8]

[8]The Hobbs Act specifies that the petition for review is against the United States. 28 U.S.C. § 2344. While a district court enforcement proceeding to secure a reparations award would not be captioned as an action against the United States, it would nevertheless constitute review of agency action. Furthermore, the existence of the district court enforcement avenue appears to have originated not as a method of review intended to create a "suit" against an adverse party. Rather, it arose from sections 30-31 of the Shipping Act, 1916, as a means of protecting a shipper's choice of venue in actions against a common carrier, when the shipper required court review of the agency's determination. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 613-15 (1966); *Interstate Commerce Comm'n v. Atlantic Coast Line R.R.*, 383 U.S. 576 (1966).

Thus, we believe that Commission reparations awards are enforceable against entities like SCSPA.

However, even if a court were to rule that a Commission reparations award is unenforceable, the issuance of an order finding violations of the Shipping Act is not futile. The Commission must be able to determine whether the actions of regulated entities like SCSPA violate the Shipping Act. Whether or not a complainant is able to collect on a reparations award is a separate issue, distinct from the Commission's obligation to pass judgment on the legality of allegedly unreasonable or otherwise prohibited actions. Also, Commission decisions in complaint cases, whether or not a reparations award is issued, serve as precedent in future complaint cases and investigations.

It is also important to note that not all "state" port instrumentalities are in fact arms of the state. Whether they are is a determination made on a case-by-case basis. *See* 13 Wright, Miller and Cooper, *Federal Practice and Procedure*, section 3524. *See also Jacintoport Corp. v. Greater Baton Rouge Port*, 762 F.2d 435 (5th Cir. 1985) (port not entitled to sovereign immunity); *Principe Compania Naviera, SA v. Board of Commissioners of the Port of New Orleans*, 333 F.Supp. 353 (E.D. La. 1971) (same).

CONCLUSION

The Commission has determined to reverse the ALJ's Order, and rule that the doctrine of state sovereign immunity does not bar Maritime Services' claim against SCSPA. We remand the case to the ALJ for a determination on the merits of: (1) SCSPA's other grounds arguing for dismissal of the proceeding and, if the case is not dismissed, (2) Maritime Services' substantive claims of violations of the Shipping Act.

THEREFORE, IT IS ORDERED, That the ruling of the Administrative Law Judge dismissing the complaint in this proceeding is reversed; and

IT IS FURTHER ORDERED, That this proceeding is remanded to the Administrative Law Judge for further action consistent with this Order.

By the Commission.

/s/
Bryant L. VanBrakle
Secretary

APPENDIX C

January 5, 2000

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

DOCKET NO. 99-21

SOUTH CAROLINA MARITIME SERVICES, INC.

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

MOTION OF RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY TO DISMISS COMPLAINT GRANTED

Norman D. Kline, Administrative Law Judge.

The Complaint and Answer

By complaint served on October 27, 1999, complainant South Carolina Maritime Services, Inc. (Maritime Services) alleges that it is a South Carolina corporation that charters a passenger ship known as the M/V TROPIC SEA, that flies the flag of the Bahamas. Maritime Services alleges that this ship is a passenger vessel having six decks, five of which are designated for passenger access, three of which (the A, D, and E decks) contain passenger staterooms. Besides buffet tables and restaurant, gift shop, lounge with bar and swimming pool, and facilities for officers and crew, the M/V TROPIC SEA allegedly contains a small casino on Deck B

and a main casino on Deck C. Maritime Services alleges furthermore that it intends to offer "passenger cruises" from the Port of Charleston sometimes to nowhere and sometimes to the Bahamas. Maritime Services also alleges that it offers numerous activities for its passengers, including dining service and entertainment such as dancing, live musicals, piano bar, and live band. However, it also alleges that it offers "bingo, casino games, and various games for the passengers' children" but maintains that passengers may enjoy casino gambling only "while the vessel is in international waters." In this regard, it is alleged, "[g]ambling operations will only be conducted while the vessel is in international waters, and will not occur in South Carolina waters." Complainant alleges that it "is a common carrier engaged in the business of providing transportation of passengers for hire."

Maritime Services alleges that respondent South Carolina State Ports Authority (SCSPA) has refused to give it berthing space at Charleston, citing five specific letters of rejection received from SCSPA between December 1998 and August 1999, which denied berthing because of a city ordinance or South Carolina laws and SCSPA's "policy" of refusing berthing to ships whose "primary purpose is gambling." Notwithstanding such "policy," it is alleged, SCSPA did provide berthing for another cruise operator, Carnival Cruise Lines, who advertised overnight "cruises to nowhere" aboard the M/S INSPIRATION, an oceangoing passenger vessel flying the flag of Panama and containing a casino featuring "slot machines, blackjack, roulette, Caribbean stud poker, wheel of fortune, bingo, and MegaCash, advertised by Carnival "as the world's largest cruise ship jackpot." Like complainant's ship, it is alleged that for its "cruises to nowhere" Carnival "provided gambling activities to the passengers while the vessel was in international waters." Maritime Services alleges furthermore that SCSPA berthed Carnival's ship that boarded passengers on May 28 and September 11, 1999, that Carnival has advertised further cruises departing Charleston on October 7,1999, and future cruises to depart in May and October 2000, that

SCSPA charged Carnival relevant port tariff charges under SCSPA's tariff and has agreed with Carnival to provide berthing to Carnival's ship.

Because of the foregoing alleged conduct, Maritime Services alleges that SCSPA has unreasonably refused to deal or negotiate with it, in violation of section 10(b)(10) of the Shipping Act of 1984 and has unduly and unreasonably preferred Carnival and unduly and unreasonably prejudiced or disadvantaged complainant, in violation of section 10(d)(4) of the 1984 Act. Complainant asks for an order compelling SCSPA to cease and desist from the aforesaid alleged violations, to order lawful and reasonable practices, and to compensate complainant "for its actual injuries caused by the Ports Authority's discriminatory practices, as well as interest and reasonable attorney's fees." Complainant alleges such injuries to include but not to be limited to "loss of profits, loss or earnings, loss of sales, and loss of business opportunities." Finally, complainant asks "[t]hat this Commission award Maritime Services such other and further relief as is just and proper."[1]

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[1]Complainant also asks that the Commission file suit in the U.S. District Court for the District of South Carolina, Charleston Division, in order to obtain a temporary restraining order and preliminary injunction against SCSPA. Complainant cites "Section 1710(h) of the Shipping Act..." (Para. 33, complaint.) SCSPA opposes this particular request, citing the fact that complainant has the right to seek its own injunction in federal court pursuant to section 11(h)(2) in aid of its own complaint whereas the Commission can seek such injunction in court pursuant to section 11(h)(1) of the Act in aid of a Commission-instituted investigation, which the instant proceeding is not. (Answer, para. 33, and SCSPA's Motion to Dismiss at 10-11.) After I advised complainant that it had the right to seek its own injunction in federal court under section 11(h)(2), complainant's counsel advised that "it is likely that our client will seek an injunction pursuant to sec. 11(h)(2)." (Letter dated November 11, 1999, from complainant's counsel to the presiding judge.) In view of the SCSPA's argument that it is entitled to immunity from *private* suits "as an arm of the State" under the 11th Amendment to the Constitution, it is doubtful if any federal court would have jurisdiction to issue such an injunction, as will be made more clear in my discussion of the 11th Amendment and State sovereign immunity doctrine below.

SCSPA admits a number of factual allegations made by Maritime Services when it has information to confirm the allegations, such as the allegation that SCSPA is "a political agency, entity, body and/or subdivision of the State of South Carolina," that it has rejected Maritime Services' repeated requests for berthing at Charleston because of state or local laws or ordinances and a "policy" regarding gambling ships, and that it has berthed Carnival's ship at Charleston, at least in September 1999. However, SCSPA denies any agreement with Carnival or that Carnival's ship is primarily one designed for gambling like complainant's. SCSPA states in its answer to the complaint that "[w]ith regard to future cruises by any cruise line or other entity, the SPA denies that it will accommodate any vessel that offers a cruise, the primary purpose of which is to promote gaming."

Aside from the particular denials by SCSPA, the main thrust of SCSPA's answer is that Maritime Services is attempting wrongfully to invoke the Commission's jurisdiction because "Congress, through the Johnson Act, has specifically determined not to preempt state laws prohibiting and regulating gaming activities within their borders, including port calls by gaming vessels." SCSPA argues that the State of South Carolina prohibits "gambling junkets, and the SPA will not permit its cruise facilities to be used to provide such services. Rather, the SPA's policy allows cruise ships to use its facilities only where gaming activities are not the primary purpose of the cruise." Several times in its answer SCSPA indicates that it will deny its facilities to cruise ships having gambling devices on board and will do so "even where the primary purpose of the cruise is not gambling" if necessary to eliminate alleged discrimination.[2] Moreover, SCSPA offered

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[2]On page one of its answer, SCSPA states that "should any determination be made to the contrary [i.e., that SCSPA has unlawfully discriminated] the SPA will deny facilities to all vessels departing from and returning to Charleston for short-term 'cruises to nowhere' with gambling devices on board, even

(continued...)

five affirmative defenses relating mainly to its contention that the Commission has no jurisdiction over the complaint because of a particular statute and the 11th Amendment to the Constitution. SCSPA also argues that SCSPA's actions are based upon the proper exercise of the police power of the State of South Carolina and contends that "Maritime Services is not a common carrier within the meaning of the Shipping Act of 1984." In its Answer to the complaint SCSPA promised to file a motion to dismiss on these grounds and three days later, it did.

SCSPA's Motion to Dismiss

In its Motion to Dismiss SCSPA has launched a massive attack on the complaint based on a number of arguments, several of which are jurisdictional in nature while others pertain more to complainants standing and the merits of its factual allegations. Two of the arguments relate to the Constitution or to a particular statute. Thus, SCSPA argues that it is a State agency and is therefore immune under the 11th Amendment to the Constitution from being sued by *private* parties either in federal courts or before the Commission. SCSPA cites recent Supreme Court decisions, such as *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 119 S. Ct. 2219 (1999); and *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

(...continued)
where the primary purpose of the cruise is not gambling." On page six of its answer, at para. 27., SCSPA states that "[w]ith regard to future cruises by any cruise line or other entity, the SPA denies that it will accommodate any vessel that offers a cruise, the primary purpose of which is to promote gaming." On page 8 of its answer, SCSPA states that "if the Commission determines that the complaint states a claim cognizable under the Shipping Act, the SPA will take appropriate remedial measures to eliminate any perceived discrimination or undue preference, as described on page 1 of this Answer."

A second argument by SCSPA of a jurisdictional nature is that Congress has reserved the matter of regulation of gambling ships to the States. SCSPA cites the Johnson Act, 15 U.S.C. sec. 1175, and argues that this Act shows that Congress intended to defer to State law with respect to control of gambling devices on ships. SCSPA cites *Casino Ventures v. Stewart*, 183 F. 3d 307 (4th Cir. 1999), in which the court held that the State of South Carolina could lawfully control gambling on ships even beyond State territorial waters under its own laws which were not preempted by the Johnson Act and, indeed, that Congress intended to extend, not curb State police power in this field. Continuing in this vein, SCSPA argues that complainant's ship is not a cruise ship at all but is classified as a "ferry," cannot provide accommodations for all its passengers, and has, as her primary purpose, gambling, therefore differing significantly from the Carnival cruise ship that SCSPA is accused of unlawfully preferring. SCSPA contends that complainant is making a "transparent attempt to circumvent the Johnson Act" and argues that complainant "seeks Commission review of state law and policy in an area that Congress has specifically left to South Carolina." (SCSPA's Motion at 8.) SCSPA therefore concludes that "the proper forum for the interpretation of South Carolina law in areas expressly reserved to the states is in a South Carolina state court." (*Id.*) SCSPA also cites a number of South Carolina anti-gambling statutes and a City of Charleston Ordinance Sec. 21-179, which it claims to authorize its conduct.

SCSPA's other arguments relate somewhat to the Commission's jurisdiction under the Shipping Act but also go to the merits of complainant's allegations of violations of that Act. Thus, SCSPA argues that complainant cannot seek relief from the Commission because allegedly complainant has failed to comply with federal law regulating cruise lines, a law that the Commission administers. Moreover, SCSPA argues that it is not a marine terminal operator as regards complainant's ship because complainant is not a common carrier by water and furthermore the Commission does not regulate everything that a marine terminal operator does even if SCSPA is a regulated marine terminal operator, especially when the activity in question involves a non-common carrier that SCSPA believes complainant to be.[3]

Complainant's Response to the Motion to Dismiss

In its Response, Maritime Services contends that SCSPA "has engaged in a pattern of discriminatory practices in its role as marine terminal operator in the Port of Charleston, South Carolina...." (Response at 1.) Maritime Services reiterates the allegations in its complaint that SCSPA has unlawfully discriminated against it by denying its ship berthing at Charleston but allowing another cruise line, Carnival, to berth at Charleston, although, like complainant, Carnival allegedly offers "cruises to nowhere" on ships that provide gambling. Complainant contends that the various South Carolina statutes cited by SCSPA do not apply to its operations and that one South Carolina court has so held regarding another cruise operator. Complainant also contends that the 1984 Act "clearly vests the Commission with authority to investigate and direct payment of reparations, as well as to subsequently file suit for injunctive relief against marine terminal operators-such as the Ports Authority-who fail to abide by the provisions of the Shipping Act." (Complainant's Response at 2.) Complainant contends that SCSPA is not immune from an action taken by the Commission under the 11th Amendment to the Constitution,

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[3]SCSPA also argues that the complaint is unverified and that "[t]his failure alone is sufficient to support dismissal." (SCSPA's Motion at 17.) If this were true, it would amount to a technical violation which could easily be cured. See *Gillen's Sons Lighterage v. American Stevedores*, 10 S.R.R. 195 (ALJ 1968); 12 F.M.C. 325, 331 n. 6 (1969). However, the complaint has a "Verification" signed by Frank Guarino, President of Maritime Services, Inc. that is sworn and subscribed before a Notary Public. See "Exhibit F" attached to Complainant's Response to Respondent's Motion to Dismiss.

that Maritime Services qualifies as a common carrier by water and that it has complied with applicable laws requiring certification of financial responsibility.

Complainant's Focus on SCSPA's Enforcement of South Carolina Law

Although perhaps not always completely consistent, Maritime Services' contends that it is not contesting the constitutionality of the underlying South Carolina laws on which SCSPA claims to justify its policy of denying berthing to complainant's ship. Instead, Maritime Services argues that it is challenging SCSPA's alleged discriminatory *enforcement* of this policy. In complainant's own words: (Complainant's Response at 4.)

> In actual fact, Maritime Services is unconcerned with the Constitutionality of the underlying laws which the Ports Authority cites as authority for its decision not to allow the M/V TROPIC SEA to berth at its facilities. Again, at least one South Carolina court reaching the issue has held squarely that these statutes do not apply to the "cruise to nowhere" activities which Maritime Services has proposed to undertake. (Case citation omitted.) *This action is a complaint about the Ports Authority's unreasonable and discriminatory enforcement of its policies, not a complaint about the policies themselves. It is the Ports Authority's discriminatory berthing practices that serve as the basis of Maritime Services' complaint and the intended focus of Federal Maritime Commission action.* (Emphasis added except for the word "enforcement".)

Having stated that Maritime Services is not challenging the South Carolina laws (which it deems not to be applicable anyway) nor the alleged "policy" that SCSPA claims to be supported by these laws, nevertheless Maritime Services

states that SCSPA is wrong to follow such "policy" when dealing with individual carriers applying for berths. Instead, Maritime Services contends that SCSPA should have decided whether to berth any particular carrier strictly on "transportation and economic conditions" and not on "moral considerations which are completely unrelated to transportation or economic conditions." (Response at 5-6.) Maritime Services contends therefore that "the Port Authority's decision to prohibit the M/V TROPIC SEA from docking at the Ports Authority's terminal is based on impermissible considerations." (*Id.* at 6.)

Complainant's Supplementation to Its Response

In lieu of conducting a formal prehearing conference, I instructed complainant to clarify several matters in order that I not misunderstand its arguments before ruling on the SCSPA's Motion. (See Order to Supplement the Record, December 9, 1999.) In particular, I requested clarification on three matters: 1) the effect of the City of Charleston Ordinance Sec. 21-179 that appears to deal with gambling ships at Charleston and that was cited by SCSPA but which complainant had not addressed; 2) whether complainant was attacking the underlying South Carolina laws or their enforcement by SCSPA; and 3) how complainant intended to prove its allegations of "undue" or "unreasonable" conduct by SCSPA within the meaning of the Shipping Act. The last matter would be relevant to the conduct of the case assuming that the complaint was not dismissed. In response to my inquiries, complainant furnished the following answers: 1) City of Charleston Ordinance Sec. 21-179 has not been interpreted by a South Carolina court but, in any event, neither South Carolina law enforcement officials nor the City of Charleston enforce the Ordinance against cruise ships and SCSPA is not authorized to enforce the Ordinance. Moreover, ". . . Complainant respectfully suggests that antigambling laws or ordinances are not before this Commission." (Complainant's Supplementation at 2.) However, states com-

plainant, "the City of Charleston Ordinance, if considered, would premise berthing decisions on factors other than purely transportation or economic considerations. The Shipping Act prohibits that consideration." (*Id.* at 3.) This answer overlaps with the next one.

2) Complainant states that it is not attacking the constitutionality of South Carolina statutes or the Charleston Ordinance and states that "[t]hat determination is for another forum." *(Id. at* 3.) However, complainant states that it is attacking SCSPA's alleged "policy" of barring only complainant's ship from Charleston and its "discriminatory enforcement." (*Id.*) Thus complainant argues that should the SCSPA's "policy" (which SCSPA contends to be based on South Carolina laws) be upheld, complainant "asks the Commission to prohibit SCSPA from continuing to discriminate against Complainant while allowing its competitors to berth and engage in the identical activity." (*Id.*) In any event complainant contends that the South Carolina laws cited by SCSPA "are all ultimately inapplicable to this proceeding." (*Id.* at 4.)

3) Complainant states that it was not aware of the Commission's rule requiring complainants to commence discovery with the filing of their complaints but that it "intends to participate in full discovery in order to resolve issue of fact in this action." (*Id.* at 4.) However, complainant also states that it "intends to work with counsel for the Ports Authority for the purpose of arriving at stipulations of fact so that the case may be decided in an expeditious manner." *(Id.)*

Whether Maritime Services is challenging SCSPA's alleged discriminatory conduct among cruise ship operators or challenging an underlying State or City "policy" or State or City laws, as I explain below, the problem is that SCSPA is an "arm" of the State of South Carolina and therefore enjoys immunity from being sued by "private" persons either in courts or before administrative agencies.

Consequently, as I also mention below, if there is merit to Maritime Services' allegations that SCSPA is discriminating among cruise ship operators without any justification recognized by the Shipping Act, the merit of such allegations would have to be determined by a procedure instituted by the Commission itself, whether informal or formal.

DISCUSSION AND CONCLUSIONS

As discussed above, respondent SCSPA has raised several arguments in asking that the instant complaint be dismissed. The first two relate to the Commission's jurisdiction while the others involve consideration of the merits of the alleged unlawful discrimination. I find, however, that the recent Supreme Court decisions interpreting the 11th Amendment and State sovereign immunity from *private* suits plus a decision in the U.S. Court of Appeals for the Fourth Circuit holding that SCSPA is an "arm of the State" and therefore entitled to the 11th Amendment immunity from *private* suits require that the instant complaint be dismissed. If there is merit to complainant's allegations that SCSPA has unlawfully discriminated and unreasonably refused to deal with complainant in violation of sections 10(d)(4) and 10(b)(10) of the 1984 Act, respectively, Maritime Services' allegations and request for remedial orders would have to be considered by the Commission in the form of a Commission-instituted investigation, whether formal or informal, because the doctrine of State sovereign immunity does not extend to proceedings against the States brought by the superior federal sovereign acting through its agent, the Federal Maritime Commission.

In recent years the Supreme Court has been elevating the doctrine of State sovereign immunity from *private* lawsuits to new heights and has even held various attempts of Congress to regulate State entities under the Interstate and Indian Commerce Clause of the Constitution (Article 1, sec. 8, cl. 3) to be beyond Congress's power. The first of

these recent Supreme Court decisions was issued in 1996, namely, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44. In that case the court held that Congress could not abrogate State sovereign immunity from *private* suits under the Constitution. Prior to 1996 no State-run entity against which a complaint had been filed with the Commission had argued that the complaint had to be dismissed on 11th Amendment grounds. Indeed, it had always been believed that any person could file a complaint against State-run marine terminal operators that enjoyed no special privileges under the Shipping Act merely because they were operated by States. The Supreme Court had so held in the leading case of *California v. United States*, 320 U.S. 577 (1944), a case involving a Commission-instituted investigation. Consequently, the Commission has for many years enforced the Shipping Act against State-run marine terminal operators by means of Commission-instituted investigations and also by proceedings initialed by *private* complaints. Whenever a State-run or purportedly State-run marine terminal operator argued that it enjoyed some type of privilege against claims against it in complaint proceedings, the arguments were quickly rejected on the authority of *California v. United States*. See, e.g., *Perry's Crane Service v. Port of Houston Authority*, 16 S.R.R. 1459, 1480-1484 (I.D.), adopted in relevant part, 19 F.M.C. 548, 556 (1977) (".. the state agency exemption has been demolished"); *Pate Stevedoring Co. of Mobile v. Alabama State Docks Dept.*, 24 S.R.R. 657, 670-673 (I.D.), adopted, 24 S.R.R. 1221 (1988).

However, in view of the decision in *Seminole Tribe of Florida* and several followup decisions of the Court, namely, *College Sav. Bank* v. *Florida Prepaid Postsecondary Ed. Expense Board*, 119 S. Ct. 2219,144 L.Ed 2d 605 (1999); and *Alden* v. *Maine*, 119 S. Ct. 2240,144 L.Ed 2d 636 (1999), the question of whether State-run or arguably State-run marine terminal operators named as respondents in Commission complaint proceedings enjoy 11th Amendment immunity

from *private* suits has arisen.[4] This development has been fueled by the fact that the Court overruled previous Court decisions that had held that States had waived their 11th Amendment immunity or had consented to being sued by *private* parties by virtue of entering into businesses subject to federal regulation and that Congress could abrogate State sovereign immunity under Congress's powers under the Interstate and Indian Commerce Clause of the Constitution.[5] Moreover in *Alden v. Maine*, cited above, the court held that Congress could not even abrogate State sovereign immunity from *private* suits in the State's own courts under the Interstate Commerce Clause. The Court also held that it did not matter in which forum a *private* case was brought as regards State sovereign immunity, although the Court also

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[4]Thus, the question of the States' 11th Amendment immunity from private suits has been raised in Docket No. 99-16 - *Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, et al.*; Docket No. 98-23 - *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*; and in Docket No. 99-04 - *Ceres Marine Terminals, Inc. v. Maryland Port Administration*. However, in No. 98-23 (*New Orleans*), it appears that the federal courts have already decided that the respondent New Orleans Board is not entitled to 11th Amendment immunity, not being an "arm of the State." See Docket No. 98-23 - Further Adjustment of Schedule to Delete Consideration of Special Jurisdictional Issue, December 13, 1999 (ALJ). In Docket No. 99-04 (*Ceres*), the parties have agreed to present the question to a federal court in the future, if need be, rather than to the Commission. The question, however, is being presented to the Commission both in the instant case and in Docket No. 99-16 (*Carolina Marine Handling, Inc.*)

[5]In its decision in *Parden v. Terminal R. Co. of Alabama Docks Dept.*, 377 U.S. 184 (1964), the Court held that a State had consented to being sued by private parties because the State had entered into a federally regulated business, by operating an interstate railroad. The Court expressly overruled *Parden* in *College Sav. Bank of Florida v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S._____, 144 L.Ed 2d 605, 619 (1999). In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court had held that Congress had the power to abrogate State sovereign immunity under the Interstate Commerce clause. However, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 445 46 (1996), the Court expressly overruled *Union Gas*.

recognized that this immunity doctrine did not extend to "a municipal corporation or other governmental entity which is not an arm of the State," citing cases. *Alden v. Maine*, cited above, 144 L.Ed 2d at 680. None of these cases, it should be emphasized, overturned the longstanding principle that the federal government or its agencies can enforce federal laws in the federal sovereign's name or as agents of the federal government against State-run entities subject to such laws, as contrasted to *private* complaints seeking relief, including money damages, where the doctrine of State sovereign immunity applies. See *College Sav. Bank v. Florida Prepaid, etc.*, cited above, 144 L.Ed 2d at 620 n. 3, citing *United States v. Texas*, 143 U.S. 621 (1892); *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 286 (1973), citing *United States v. Mississippi*, 380 U.S. 128, 140-141 (1965). SCSPA therefore does not contest the Commission's jurisdiction to conduct Commission-instituted proceedings against State-run terminal operators like SCSPA. (SCSPA's Motion at 15-16.)

If SCSPA's argument is correct and the Commission lacks jurisdiction to regulate truly State-run marine terminal operators by means of *privately* initiated and *privately*-prosecuted complaint proceedings, a decision so holding would change the form in which the Commission enforces the 1984 Act against true "arms" of the States. It would in no way affect the manner in which the Commission regulates all other entities subject to the 1984 Act, but, as regards true State entities, it would eliminate *private* money-damages awards. Because such a decision would have some impact on Commission enforcement, as described, the matter should be addressed by the Commission even if the impact is not substantial. I also find no reason based on precedent that would warrant the Commission in deferring ruling on the matter at this time, as I explain below.

The first matter that I consider is the fact that SCSPA's Motion goes to the very jurisdiction of the Commission under the Shipping Act even to retain the complaint on its docket. The Commission has indicated that it approves of its judges

addressing a jurisdictional issue before proceeding to consider the merits of complaints. Thus, in *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 762 (1999), the Commission stated that "an agency must reach jurisdictional issues before addressing the merits of a case." The Commission cited one of its earlier decisions in *Government of the Territory of Guam v. Sea-Land Service, Inc. (Gov-Guam)*, 28 S.R.R. 252, 265 (1998); and *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990). The Commission noted that sometimes the agency could bypass deciding a jurisdictional issue and proceed to decide the merits of a case when the merits and jurisdiction were intertwined and when the merits were so easy to decide that "the better use of administrative resources warrants a disposition on the merits without a finding of jurisdiction." (*Id.*) However, as the Commission noted, the Supreme Court abrogated the second reason to bypass deciding jurisdictional issues as regards federal courts in the case of *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012 (1998). The issue as to SCSPA's State sovereign immunity is separate from the merits of the complaint and the merits are not easily determined without a thorough investigation of the facts of alleged discrimination and the application of local South Carolina law. Consequently, I conclude that the jurisdictional issue should be addressed and resolved now exactly for the reasons given in *GovGuam* as well as the reasons given below.

The next matter that I have considered is the fact that deciding an issue under the 11th Amendment does implicate the Constitution and the Commission has declined to rule upon a constitutional issue in a past case. Thus, in *Plaquemines Port v. Federal Maritime Commission*, 838 F.2d 536, 544 (D.C. Cir. 1988), the court affirmed the Commission's decision in *New Orleans Shipping Association v. Plaquemines Port*, 23 S.R.R. 1363, 1371 (1986), in which the Commission found several marine terminal charges to be unlawful under the Shipping Act but declined to address a constitutional question as to their validity under a non-Shipping Act provision of the Constitution.

The court stated that the Commission could have decided the constitutional question but did not have to and the court itself decided the question so as to affirm the Commission's decision on the Shipping Act issues.

More recently, in the ongoing case of Docket No. 94-01 - *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, which is now before the Commission on remand from the Fourth Circuit Court of Appeals, the respondent Maryland Port Administration (MPA) has agreed with complainant Ceres to defer litigating the question as to whether MPA is an "arm" of the State of Maryland entitled to 11th Amendment immunity and has agreed to raise the question before a court if necessary. The Commission approved the agreement of the parties and stated that "any Eleventh Amendment and sovereign immunity issues can be resolved most appropriately and efficiently in federal court." Docket No. 94-01, Order Granting Joint Motion to Approve Stipulation, September 17, 1999, at 2. I do not conclude that I should defer ruling on SCSPA's Motion on account of the *Plaquemines* or *Ceres* rulings for the reasons given below.

In the instant case, SCSPA is not asking the Commission to interpret a provision of the Constitution having nothing to do with the Shipping Act. In *Plaquemines*, the particular constitutional provision in question concerned a prohibition against taxes on exports. In the instant case, however, SCSPA is asking the Commission to rule upon the scope of its jurisdiction under the Shipping Act and whether SCSPA's defense of State sovereign immunity from *private* suits is a valid one under that Act. Surely the Commission is able to rule upon its own statute and if Congress has been silent on the question, a court will defer to the Commission's interpretation of its own enabling Act if the interpretation has a reasonable basis. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In the *Ceres* case, the parties agreed to postpone litigating the question as to whether MPA was an "arm of the State"

entitled to 11th Amendment immunity from *private* complaints. Obviously that has not happened in the instant case in which SCSPA wants a ruling now on the question. Secondly, the parties have largely progressed beyond the hearing stage in *Ceres* unlike the instant case which is in its very early stages. Therefore, MPA would have less motivation in having its jurisdictional defense decided by the Commission in the interest of avoiding the burden and expense of mounting a defense on the merits of the complaint. Thirdly, whether MPA is an "arm of the State" entitled to 11th Amendment immunity has apparently never been decided by any court, at least counsel for MPA has not cited any such court decision to the Commission as far as I am aware. By contrast, in the instant case, the Fourth Circuit Court of Appeals has decided the question as to SCSPA and found SCSPA to be a bona fide "arm of the State" that qualifies for the 11th Amendment immunity. See *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir. 1995). As the court's decision in *Ristow* illustrates, determining the status of a purported State run marine terminal operator under the 11th Amendment is not an easy task but requires consideration of a number of factors, including State law. *Ristow*, 58 F.3d at 1052 n. 3.[6] Consequently, the Commission need not defer to a court to await the court's decision as to whether SCSPA is entitled to 11th Amendment immunity from *private* suits nor as to whether SCSPA has consented to being "sued" by a *private* complainant. In the instant case the Commission

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[6]The determination of an entity's status as an "arm of the State" entitled to 11th Amendment immunity from private suits involves consideration of complicated factors under tests enunciated by the Supreme Court and the Circuit Courts of Appeals. In *Ristow*, the court cited a Supreme Court decision setting forth six factors to consider, and the Fourth Circuit "distilled" these factors into four, including how the entity was treated as a matter of state law. *Ristow*, 58 F.3d at 1052 n. 3. Other circuit courts have described the process as involving a "multi-factor, fact-intensive 'arm of state' test." *Parella v. R.I. Employees' Retirement System*, 173 F.3d46, 54-55 (1st Cir. 1999). See also *Supreme Court 's Construction of Eleventh Amendment, Restricting Federal*

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need only decide if it must alter the form in which it enforces the Shipping Act against State entities that operate marine terminals by relying on Commission-instituted investigatory proceedings rather than on *private* complaints. By deferring ruling on SCSPA's Motion at this time, there is a risk of delay because SCSPA could probably seek immediate court review under the so-called "collateral order" doctrine that allows an aggrieved party whose rights will be irretrievably lost without immediate judicial review to seek such review before being forced to undergo the burden and expense of defending on the merits in what could be a lengthy trial. The normal rule governing judicial review of the Commission's decisions under the Judicial Review Act (the "Hobbes Act") precludes judicial review before there is a "final order" of the Commission. See 28 U.S.C.A. sec. 2344. This rule is known as the "ripeness for review" doctrine in administrative law. The Supreme Court has explained that the reason for the rule is to prevent premature judicial interference with administrative proceedings, but the Court also recognized that under some circumstances judicial review might be necessary at an early stage. In the words of the Court:

> ... it is fair to say that its [the ripeness for review doctrine] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling

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Judicial Power Over Suits Against States, 106 L.Ed 660-720 (1991). Whether a particular quasi-public port authority or commission is entitled to 11th Amendment immunity depends upon local laws and considerations. SCSPA has been found to qualify for 11th Amendment immunity. However, other port commissions or authorities have not been so found. See, e.g., *Principe Compania Naviera, S.A. v. Board of Commissioners of the Port of New Orleans*, 333 F. Supp. 353 (E.D. La. 1971) (Board not entitled to 11th Amendment immunity); *Jacintoport Corp. v. Greater Baton Rouge* Port, 762 F.2d 435 (5th Cir. 1985) (Baton Rouge Port Commission not entitled to 11th Amendment immunity). Clearly, as the Commission stated in *Ceres*, the status of MPA under the 11th Amendment "can be resolved most appropriately and efficiently in federal court."

> themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, *requiring us to evaluate both the fitness of the issues for judicial decisions and the hardship to the parties of withholding court consideration. Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (footnote omitted) (emphasis added).

If the Commission defers ruling on SCSPA's Motion or denies it, the SCSPA, an "arm of the State," will be forced to undergo the burden and expense of defending against a *private* party in a complaint proceeding even though the Fourth Circuit Court of Appeals has found that SCSPA is a bona fide State "arm" entitled to 11th Amendment immunity from *private* suits. The Supreme Court views the denial of a State entity's immunity rights under the 11th Amendment to be so important that it has held that a State entity has the right to an immediate appeal to a court if its motion is denied. See *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 1399 146 (1993), in which the Court described the importance of respecting the 11th Amendment's protection of and respect for the States' "dignitary interests." In the words of the Court:

> "The very object and purpose of the 11th Amendment were to *prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.*" (Case citation omitted.) The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including a sovereign immunity. (Case citation omitted.) It thus accords the States the respect owed them as members of the federation. While application of the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, *its ulti-*

mate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated. (Footnote quoted below in part.) (Emphasis added.)

In the footnote to the above quotation, the Court rejected the argument that the States need not enjoy their special immunity from *private* suits because they might be able to "bear the burden of litigation" better than could individual officials. The Court remarked:

> The Eleventh Amendment is concerned not only with the States' ability to withstand suit, but with their *privilege not to be sued.* (Emphasis added.)

Other decisions of the federal courts allowing immediate appeals to courts before requiring entities to undergo the burdens of defending on the merits when they would irretrievably lose rights thereby illustrate how the courts find it necessary to shortcut the usual appellate procedure that requires parties to litigate all issues to termination before seeking judicial review.[7]

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[7]The "collateral order" doctrine was designed to protect parties from losing the protection of a valuable right or privilege which was a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963). In the case cited, defendants raised a special immunity from-suit statutory defense which had to be decided at the outset rather than subject the defendants "to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings. The "collateral order" doctrine originated in the case of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, the Court allowed immediate appeal because if judicial review were postponed until the termination of the litigation of the merits of the case, "it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Cohen*, 337 U.S. at 546. In the instant case, if SCSPA loses its claimed immunity from a *private* complaint and even assuming that it prevails on the merits, it will have lost the protection against enduring the burden, expense and "indignity" of defending against a private party, a protection that the Supreme Court believes that States should have.

In conclusion, I can find no valid reason to defer ruling on SCSPA's Motion or to deny SCSPA the protection from *private* suits that the Fourth Circuit has already found that SCSPA has. Nor do I see any significance to an argument that the doctrine of 11th Amendment-State sovereign immunity from *private* suits does not extend to administrative proceedings. The Supreme Court has held that statutes enacted by Congress under Article 1, sec. 8, cl. 3 of the Constitution (the Interstate and Indian Commerce Clause) cannot abrogate the States' 11th Amendment immunity. See *Seminole Tribe of Florida v. Florida*, cited above. If federal courts that are established under Article III of the Constitution must respect States" 11th Amendment immunity and Congress is powerless to override the States' immunity under Article I of the Constitution, it is irrational to argue that an agency like the Commission, created under an Article I statute, is free to disregard the 11th Amendment or its related doctrine of State immunity from *private* suits. To do so would appear to be inconsistent with the Supreme Court's holding in *Alden v. Maine*, cited above, 144 L.Ed 2d at 665, that "The logic of the decisions [interpreting State immunity under the 11th Amendment] . . . does not turn on the forum in which the suits were prosecuted . . . ." To find that the Commission has the power to disregard an 11th Amendment claim of immunity from proceedings initiated by *private* parties would mean that the Commission, which cannot enforce its orders without the aid of the federal courts, has a power that those courts lack.[8] At least one court which has addressed the question of whether an Article I agency can entertain a proceeding brought by a *private*

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[8]Enforcement of Commission orders for payment of money can only be done if "the person to whom the award was made" seeks enforcement of a Commission order in a United States district court. See sec. 13(d) of the 1984 Act, as amended. Enforcement of nonreparation orders (i.e., cease and desist orders) similarly requires an order of a district court. See section 13(c) of the 1984 Act, as amended. As another example of the futility of a *private* party trying to prove its allegations of violations of the Shipping Act in a *private* complaint proceeding that seeks a cease and

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party against a State agency entitled to 11th Amendment immunity has held that the proceeding had to be dismissed. See *Hensel v. Office of Chief Admin. Hearing*, 38 F.3d 505 (10th Cir. 1994). However, it is unnecessary for the Commission to become involved in an 11th Amendment controversy, which would occur if the Commission decides to retain the instant *private* complaint and continue the instant proceeding in the form in which it was brought against SCSPA. That is because the Commission has the authority to look into allegations of Shipping Act violations and enforce the Shipping Act by means other than *private* complaints, which other means are not barred by the 11th Amendment.

The Commission, of course, is authorized by law to institute a formal investigatory proceeding into any violations of the Shipping Act whether committed by an "arm of the State" or by a purely private entity. See section 11(c), Shipping Act of 1984. Alternatively, the Commission could simply refer the allegations in the complaint to the Bureau of Enforcement (BOE) and await

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desist order plus an order for the payment of reparations (money damages), such party would have to go to federal court for enforcement against the State "arm." But what federal court would take jurisdiction of a *private* suit for enforcement of a reparations award that would have to be paid out of the State treasury? Furthermore, the complainant in the instant case would have to seek enforcement in a district court in South Carolina, which lies in the Fourth Circuit. But according to the Fourth Circuit's opinion in *Ristow v. South Carolina Ports Authority*, cited above, 58 F.3d at 1054. .. "a judgment against the Ports Authority cannot be legally enforced against the state." For that matter, how would complainant even obtain enforcement of a cease and desist order against SCSPA, such order being equivalent to an injunction issued by a federal court. See *Seminole Tribe of Florida v. Florida*, cited above, 517 U.S. at 58 (the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (if State is the real party affected by the *private* suit, the State enjoys immunity from a suit seeking injunctive relief); *Hensel v. Office of Chief Administrative Hearing*, 38 F.3d 505, 508-409 (10th Cir. 1994) (State is immune from private suit seeking prospective injunctive relief).

BOE's recommendations. For example, in Docket No. 98-13 - *Tak Consulting Engineers v. Sam Bustani et al*, the Commission referred complainant's request for a formal investigation into the activities of respondent NVOCCs to BOE, stating:

> The Commission has determined to refer the request for an investigation to its Bureau of Enforcement, so that it may decide whether to recommend initiation of a formal investigation in this case or take other appropriate action. Docket No. 98-13 - Order Referring Request for Investigation to Bureau of Enforcement, September 11, 1998, 28 S.R.R. 578.

Alternatively, the Commission may dismiss the instant complaint and instruct complainant first to seek a ruling from the appropriate South Carolina State court as to the lawfulness of SCSPA's conduct under South Carolina law, namely, Charleston Ordinance Sec. 21-179, before asking the Commission to look into the complainant's allegations.

Whatever procedure the Commission may choose that is not barred by the 11th Amendment, as is the instant *private* complaint proceeding, SCSPA's arguments that Congress intended to leave to the States the matter of regulating cruise ships offering gambling will have to be considered as will the question as to how South Carolina law, namely, Charleston Ordinance Sec. 21-179, affects the issues.[9]

The instant complaint is dismissed on the basis of respondent SCSPA's entitlement to immunity from *private* suits under the 11th Amendment to the Constitution and its related doctrine

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[9]Two other cruise ship operators have sought and obtained rulings from the federal and State courts under South Carolina anti-gambling laws that did not speak to the instant situation at Charleston. See *Casino Ventures v. Stewart*, 183 F.2d 307 (4th Cir. 1999); and *Stardancer Casino, Inc. v. Robert M. Stewart, Sr., et al.*, Court of Common Pleas, State of South Carolina, County of Charleston (attached as Exhibit A to complainant's Response to SCSPA's Motion to Dismiss). No court has yet interpreted Charleston Ordinance Sec. 21-179. By bypassing the opportunity to obtain a declaratory or similar ruling from a State court, Maritime Services is ask-

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of State sovereign immunity from *private* suits. This ruling is subject to whatever action the Commission might deem appropriate with respect to complainant's allegations that SCSPA has violated the Shipping Act.[10]

/s/
Norman D. Kline
Administrative Law Judge

(...continued)
ing the Commission to invade the province of the State courts to some extent and to make detailed findings of fact under State law regarding the status of complainant's ships as compared to those of Carnival Cruise Lines, the alleged preferred person. A ruling by a State court could eliminate the alleged discrimination or at least narrow the issues. When there is a question of State law that might resolve or substantially alter the ultimate determination of a federal case, federal courts "abstain" to allow the State courts to rule on the matter under local law. See the leading cases of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); and *Louisiana Power & Light Co. v. City of Thibodeaux*, 360 U.S. 25 (1959). The Commission has followed its own version of "abstension." In *Burlington Northern Railroad Co. v. M.C Terminals*, 26 S.R.R. 934 (1993), the Commission declined to rule on the Shipping Act lawfulness of a certain marine terminal operator's practice that intimately involved a railroad's duties under the Interstate Commerce Act. The Commission ordered the parties before it to initiate a proceeding before the Interstate Commerce Commission (I.C.C.), failing which the Commission would dismiss the complaint. If the parties initiated such a proceeding, the Commission announced that it would hold the pending complaint case before the Commission in abeyance pending ruling of the I.C.C. (26 S.R.R. at 950).

[10]I am aware of the fact that respondent SCSPA has also moved for dismissal on 11th Amendment grounds in Docket No. 99-16 - *Carolina Marine Handling, Inc. v. SCSPA et al.*, and that Judge Dolan has denied a motion to partially consolidate this case with that one but will consider all necessary pleadings in both cases before ruling. See his ruling in Docket No. 99-16, January 4, 2000. SCSPA's Motion in the instant case was filed as long ago as November 19, 1999, has been answered by the complainant in the instant case, and has been ripe for decision for some time. The instant ruling will obviously have precedential value. Complainant in Docket No. 99-16 is not a party to the instant case. However, it will now have the opportunity of analyzing the instant ruling and addressing the reasons I have given for dismissal before filing its reply to SCSPA's Motion in No. 99-16, now due on January 18, 2000.

APPENDIX D

Section 3 of the Shipping Act of 1984, 46 U.S.C. app. 1702.
Definitions.

As used in this chapter -

...

(14) "marine terminal operator" means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter 11 of chapter 135 of title 49.

Section 10 of the Shipping Act of 1984, 46 U.S.C. app. 1709.
Prohibited acts.

(b) Common carriers
No common carrier, either alone or in conjunction with any other person, directly or indirectly, may ...

(10) unreasonably refuse to deal or negotiate

...

(d) Common carriers, ocean transportation intermediaries, and marine terminal operators.

...

(3) The prohibitions in subsections (b)(10) and (13) of this section apply to marine terminal operators.

(4) No marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.

Supreme Court, U.S.
FILED
AUG 10 2001
CLERK

No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The principle that a private party cannot sue a sovereign without its consent has been universally established and accepted since the Constitution was ratified and our system of government was thereby created. In this case, the United States Court of Appeals for the Fourth Circuit rejected a federal administrative agency's claim that it has the power to adjudicate a private cause of action against an unconsenting state. Properly considered, therefore, the petition for writ of certiorari asks this Court to decide the following question:

> Whether an unconsenting state is entitled to sovereign immunity from a private cause of action for specific relief and damages when that cause of action is before a federal administrative agency.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
1. The Federal Maritime Commission	2
2. The Regulation of Gambling Ships	5
3. The Proceedings Below	6
REASONS FOR DENYING THE WRIT	9
I. This Court Should Deny the Petition Because the Decision Below Faithfully Followed This Court's Precedent	11
II. This Court Should Deny the Petition Because This Case Does Not Involve United States Oceanborne Foreign Commerce	12
III. This Court Should Deny the Petition Because Neither the United States nor the Commission Analyzed the Scope of Sovereign Immunity Asserted by the United States Before Executive Agencies	14
IV. This Court Should Deny the Petition Because the Commission's Arguments Are Without Merit	16
A. The Shipping Act Does Not Expressly Authorize Private Suits Against the States, Therefore, the Constitutionality of the Shipping Act Is Not at Issue	16
B. This Court Has Explicitly Rejected the Commission's Assertion that Federal Maritime Interests Can Trump the United States Constitution	18

TABLE OF CONTENTS—Continued

	Page
C. No Conflict Exists Among the United States Courts of Appeals Regarding State Sovereign Immunity	21
1. Current Appellate Court Decisions Uniformly Apply the Doctrine of Sovereign Immunity in Federal Administrative Adjudications filed by Private Parties against Unconsenting States	21
2. Cases Cited by the Commission Do Not Demonstrate a Split of Authority among the United States Courts of Appeals	22
CONCLUSION	30
APPENDIX A	1a
APPENDIX B	4a

TABLE OF AUTHORITIES

CASES	Page
Alden v. Maine, 527 U.S. 706 (1999)	*passim*
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)	18
Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 121 S. Ct. 955 (2001)	17-18
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)	27
Breard v. Greene, 523 U.S. 371 (1998)	19
Brennan v. Iowa, 494 F.2d 100 (8th Cir. 1974)	23-24
Casino Ventures v. Stewart, 183 F.3d 307 (4th Cir. 1999), *cert. denied*, 528 U.S. 1077 (2000)	5
College Savings Bank v. Florida Prepaid Post-secondary Education Expense Board, 527 U.S. 666 (1999)	19, 24
Connecticut Department of Environmental Protection v. Occupational Safety and Health Administration, 138 F. Supp. 2d 285 (D. Conn. 2001)	21
Delaware Department of Health & Social Services v. United States Department of Education, 772 F.2d 1123 (3d Cir. 1985)	28
Ellis Fischel State Cancer Hospital v. Marshall, 629 F.2d 563 (8th Cir. 1980)	23-28
Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, 411 U.S. 279 (1973)	24
Fitzpatrick v. Baker, 427 U.S. 445 (1976)	18
Florida v. United States, 133 F. Supp. 2d 1280 (N.D. Fla. 2001)	21
Hans v. Louisiana, 134 U.S. 1 (1890)	1, 11, 26
Hensel v. Office of Chief Administrative Hearing Officer, 38 F.3d 505 (10th Cir. 1994)	14-15

TABLE OF AUTHORITIES—Continued

	Page
In re New York, 256 U.S. 490 (1921)	19-20
Kimel v. Flaorida Board of Regents, 528 U.S. 62 (2000)	17
Marshall v. A & M Consolidated Independent School District, 605 F.2d 186 (5th Cir. 1979)	24
Monaco v. Mississippi, 292 U.S. 313 (1934)	26
Ohio Environmental Protection Agency v. Department of Labor, 121 F. Supp. 2d 1155 (S.D. Ohio 2000)	22
Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184 (1964)	24
Premo v. Martin, 119 F.3d 764 (9th Cir. 1997)	28
Rhode Island Department of Environmental Management v. Department of Labor, 115 F. Supp. 2d 269 (D.R.I. 2000)	22
Ristow v. South Carolina State Ports Authority, 58 F.3d 1051 (4th Cir. 1995)	6
South Carolina State Ports Authority v. Federal Maritime Commission, 243 F.3d 165 (4th Cir. 2001)	*passim*
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)	19-20, 22, 29
Stardancer Casino, Inc. v. Stewart, No. 25335, 2001 WL 848427 (S.C. July 30, 2001)	6-7
Tennessee Department of Human Services v. United States Department of Education, 979 F.2d 1162 (6th Cir.1992)	28-29
United States Department of Treasury v. Fabe, 508 U.S. 491 (1993)	5
United States Term Limits, Inc. v. Thorton, 514 U.S. 779 (1995)	20
United States v. Mississippi, 380 U.S. 128 (1965)	25

TABLE OF AUTHORITIES—Continued

	Page
Welch v. Texas Department of Highways & Public Transport, 483 U.S. 468 (1987)	19, 24
Williams v. United States, 289 U.S. 553 (1933)	20
STATUTES AND REGULATIONS	
15 U.S.C.A. § 1175 (West 1998)	2, 5, 6, 13
18 U.S.C.A. § 7(1) (West 2000)	5
20 U.S.C.A. § 107b(6) (West 2000)	28
42 U.S.C. § 5851	26
Shipping Act of 1984, Pub. L. No. 98-237 (1984) (codified as amended at 46 U.S.C.A. app. §§ 1701-1719 (West Supp. 2001)) ("Shipping Act")	*passim*
Pub. L. No. 102-251, § 202, 106 Stat. 60 (1992)	5
46 C.F.R. § 501.5(i) (2000)	3
46 C.F.R. § 502.42 (2000)	27
46 C.F.R. § 502.227 (2000)	4
46 C.F.R. § 502.281-291 (2000)	3
46 C.F.R. § 502.285(a) (2000)	4
46 C.F.R. pt. 502, subpt. J (2000)	4
46 C.F.R. pt. 502, subpt. R (2000)	4
CONSTITUTIONAL PROVISIONS	
Article I	21-22, 29
Article III	21, 28
Eleventh Amendment	*passim*
MISCELLANEOUS	
53 Cong. Rec. 8276	17-18
1990-1999 FED. MAR. COMM'N ANN. REPS.	4
Exclusive Tug Franchises — Marine Terminal Operators Serving the Lower Mississippi River, Docket No. 01-06, Order to Show Cause	4

TABLE OF AUTHORITIES—Continued

	Page
LLOYD'S REGISTER OF SHIPPING, [Vol. P-Z] REGISTER OF SHIPS 1999-2000 (1999)	7
THE FEDERALIST NO. 81 (Alexander Hamilton) (H. Dawson ed. 1876))	26

STATEMENT OF THE CASE

This case involves the application of the State of South Carolina's sovereign immunity to bar a suit filed against an arm of the State by a private citizen with the Federal Maritime Commission ("Commission"). In the decision below, the United States Court of Appeals for the Fourth Circuit held that a state is entitled to assert its sovereign immunity in a suit filed by a private party with a federal administrative agency. *S.C. State Ports Auth. v. Fed. Mar. Comm'n*, 243 F.3d 165 (4th Cir. 2001) (Pet. App. A, 1a-25a). The Commission argues in its petition for a writ of certiorari that the Fourth Circuit's decision expands a state's sovereign immunity beyond the literal terms of the Eleventh Amendment and holds a federal statute unconstitutional. To the contrary, the Fourth Circuit's decision did not find the federal statute at issue unconstitutional, and the court correctly applied the doctrine of sovereign immunity consistently with this Court's seminal decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), and its progeny.

As with many other cases involving state sovereignty, the facts of this case do not fall squarely within the literal terms of the Eleventh Amendment. The complainant is a citizen of South Carolina and the respondent is an arm of that same state, whereas the Amendment speaks expressly to disputes between a citizen of one state and a different state. In *Hans*, this Court applied a state's sovereign immunity to a dispute between a private party and that party's own state. This Court has long counseled that state sovereign immunity "neither derives from nor is limited by the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Accordingly, the Amendment confirms, but does not establish the boundaries of, a state's sovereign immunity.

The Fourth Circuit considered the similarities between an administrative adjudication and a judicial proceeding. For example, if Congress creates a private cause of action before

a federal administrative agency that is indistinguishable from a cause of action in federal court, it logically follows that a sovereign's immunity in proceedings in one is available in the other. In this regard, the United States has also asserted its own immunity in proceedings before its executive agencies. *See Hensel v. Office of Chief Admin. Hearing Officer*, 38 F.3d 505 (10th Cir. 1994). In *Hensel*, the United States Department of Justice successfully asserted the sovereign immunity of the United States in the context of a proceeding before an administrative tribunal of the same Department of Justice. Thus, the Commission effectively asks this Court to address a question that implicates the immunity not only of the States, but also of the United States. However, as discussed below, neither the Commission nor the United States was able to address below the scope of the federal government's sovereign immunity before administrative agencies.

This case involves a challenge by a domestic company that was denied the right to use the port of Charleston, South Carolina, to operate gambling cruises. The regulation of gambling is a wholly domestic concern, and Congress ceded jurisdiction over gambling to the States in the Johnson Act. 15 U.S.C.A. § 1175 (West 1998), *reprinted in* Resp. App. at 1a-3a. The Commission has not addressed the relationship between the Johnson Act and its jurisdiction.

1. *The Federal Maritime Commission.* The Commission is a federal regulatory agency located in Washington, D.C., having specified regulatory response-bilities over ocean shipping services in United States foreign commerce set forth in the Shipping Act of 1984, Pub. L. No. 98-237 (1984) (codified as amended at 46 U.S.C.A. app. §§ 1701-1719 (West Supp. 2001)) ("Shipping Act"). The Commission primarily oversees certain agreements exempted from the antitrust laws among ocean common carriers or other entities, such as marine terminal operators, which are engaged in United States foreign commerce. Shipping Act §§ 4-7, 46

U.S.C.A. app. §§ 1703-1706 (West Supp. 2001). The Commission has no jurisdiction over gambling vessel operations, safety, environmental protection, navigation, vessel construction, vessel documentation, vessel inspection, or licensing of seafaring personnel. The principal shipping statute administered by the Commission is the Shipping Act. In pertinent part, the Act authorizes private formal complaints alleging violations of the Act, including the granting of "any undue or unreasonable preference" or "unreasonably refus[ing] to deal." Shipping Act §§ 10(d)(4) & (b)(10), respectively, 46 U.S.C.A. app. §§ 1709(d)(4) & (b)(10) (West Supp. 2001), respectively, *reprinted in* Pet. App. D at 63a.

The Shipping Act authorizes two kinds of proceedings to determine a violation of the Act. First, the Shipping Act allows the Commission to conduct its own investigations into alleged violations of the Act. Shipping Act § 11(c), 46 U.S.C.A. app. § 1710(c) (West Supp. 2001); *see also* 46 C.F.R. § 501.5(i) (2000) (responsibilities of the Bureau of Enforcement); 46 C.F.R. § 502.281-291 (2000) (nonadjudicatory investigations). Second, Section 11(a) of the Shipping Act allows a private citizen to file a complaint with the Commission for alleged violations of the Act. 46 U.S.C.A app. § 1710(a) (West Supp. 2001). The Act provides in part:

> (g) Reparations. For any complaint filed within 3 years after the *cause of action* accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this chapter plus reasonable attorney's fees.

46 U.S.C.A. app. § 1710(g) (West Supp. 2001) (emphasis added). The doctrine of sovereign immunity, embodied in the Eleventh Amendment, bars the proceeding when a private party files a complaint against a state.

As the Fourth Circuit properly concluded, when a party files a formal complaint with the Commission, the proceeding "takes the form of an adjudication." Pet. App. A at 15a. The case is assigned to an administrative law judge, who presides over the taking of discovery by parties, other pre-trial practice, and trial. 46 C.F.R. pt. 502, subpt. J (2000). The administrative law judge issues a decision that is final and binding unless a party requests review by the Commission or the Commission undertakes review on its own initiative. 46 C.F.R. § 502.227 (2000). "The proceeding thus walks, talks, and squawks very much like a lawsuit." Pet. App. A at 15a.

On the other hand, when the Commission initiates its own investigation, it selects the target(s) of the investigation, frames the issues, establishes a schedule for the investigation, and authorizes its representatives to conduct the investigation. 46 C.F.R. pt. 502, subpt. R (2000). In fact, the Commission primarily regulates through this investigatory authority. Since 1990, the Commission has brought an average of 224 formal investigations per year and collected an average of $6.3 million in civil penalties per year. 1990-1999 FED. MAR. COMM'N ANN. REPS. Further, the Commission may hold investigational hearings, which are "distinguished from hearings in adjudicatory proceedings," and seek an injunction in district court, if warranted. 46 C.F.R. § 502.285(a) (2000); *see also* 46 U.S.C.A. app. § 1713 (West Supp. 2001). Presumably, the Commission would consider whether it has jurisdiction over a controversy before it initiates its own investigation.[1] The Ports Authority does not challenge the

[1] *See Exclusive Tug Franchises—Marine Terminal Operators Serving the Lower Mississippi River*, Docket No. 01-06, Order to Show Cause at 2-3 (Fed. Mar. Comm'n, June 11, 2001), *available at* http://www.fmc.gov/ Dockets/01-06.pdf (providing an example of a case in which the Commission addressed the jurisdictional issue first).

Commission's authority to use this investigative authority to regulate state conduct.

Thus, the Fourth Circuit's decision does not impair the Commission's authority or ability to regulate state-run ports nor does it leave state-run ports "immune" from regulation. Petition at 17.

2. *The Regulation of Gambling Ships.* The Commission has no jurisdiction to regulate gambling, gambling cruises, or "cruises to nowhere" (gambling cruises with no fixed destination). In the Johnson Act, Congress explicitly recognized the preeminent state interest in controlling gambling and sought to enhance, not curb, state police power in this field. *Casino Ventures v. Stewart,* 183 F.3d 307, 311 (4th Cir. 1999), *cert. denied,* 528 U.S. 1077 (2000). Recent amendments to the Johnson Act confirm this explicit recognition. *Id.* (citing Pub. L. No. 102-251, § 202, 106 Stat. 60, 61-62 (1992)). The Shipping Act contains no authority to alter this statutory framework.

The Johnson Act reverses the ordinary preemption rules with respect to conflicting state and federal laws by expressly declaring Congress' intent to defer to state law.[2] 15 U.S.C.A. § 1175(b)(2) (West 1998). Moreover, the Johnson Act does not apply to state territorial waters. *Id.* § 1175(a) (Section 1175 applies only to vessels within the maritime and territorial jurisdiction as defined by § 7 of Title 18); 18 U.S.C.A. § 7(1) (West 2000) (specifically excludes state waters from United States maritime jurisdiction). The Act generally makes the use of gambling devices illegal in the United States. 15 U.S.C.A. § 1175(a) (West 1998). It carves out an exception to the general rule and allows gambling "on

[2] *Cf. United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 499-500 (1993) (interpreting a similar provision in the McCarran-Ferguson Act by which Congress restored the supremacy of the states over insurance regulation).

a vessel that is not within the boundaries of any State or possession of the United States." *Id.* § 1175(b)(1)(A). However, the Act explicitly permits a state to prohibit gambling "cruises to nowhere," cruises that begin and end at the same point, but go outside of United States territory for the purpose of gambling. *Id.* § 1175(b)(2).

Until the South Carolina Supreme Court's recent decision in *Stardancer*, the South Carolina government interpreted the State's anti-gambling statutes to prohibit the operation of cruises to nowhere. However, in *Stardancer*, the court held that cruises to nowhere do not violate any state criminal statute.[3] *Stardancer Casino, Inc. v. Stewart*, No. 25335, 2001 WL 848427, at *5 (S.C. July 30, 2001).

In effect, the Commission is claiming a "unique federal interest," (Petition at 16), in an area where Congress not only gave it no power to regulate, but also specifically recognized the primacy of a state's interest. Although the federal government has a legitimate interest in regulating oceanborne foreign commerce, this case does not implicate that interest.

3. *The Proceedings Below.* South Carolina Maritime Services, Inc., ("Maritime Services"), a South Carolina citizen, filed a complaint against respondent South Carolina State Ports Authority ("Ports Authority") before the Commission on October 27, 1999, seeking injunctive relief, damages, interest, and attorneys' fees for alleged violations of the Shipping Act. The Ports Authority is an agency of the State of South Carolina and an arm of the State. *Ristow v. S.C. State Ports Auth.*, 58 F.3d 1051, 1052 (4th Cir. 1995); *see also* Pet. App. A at 21a. Maritime Services chartered a passenger ship known as the M/V TROPIC SEA intending to offer gambling cruises to nowhere from the port of Charleston. The M/V TROPIC SEA was originally classified as

[3] The Ports Authority has not yet completed its analysis of the implications of this ruling on its policies.

a ferry.[4] Although it can board 800 passengers, it has overnight accommodations for only 200 passengers.

Until the South Carolina Supreme Court's recent *Stardancer* decision, the South Carolina government interpreted State law to prohibit cruises to nowhere. Consistent with the State's interpretation, the Ports Authority's written policy was to deny a passenger vessel a berth at Charleston's port if the vessel's primary purpose was gambling. Based on this policy and its finding that the M/V TROPIC SEA is primarily a gambling vessel, the Ports Authority denied Maritime Services a berth at Charleston harbor. In its complaint before the Commission, Maritime Services alleged that the Ports Authority allowed another cruise vessel to berth in Charleston's port, and that the Ports Authority's refusal to grant that privilege to the M/V TROPIC SEA was unreasonable under the Shipping Act. However, the other cruise vessel, operated by Carnival Cruise Lines, was unquestionably a vessel having a primary purpose other than gambling.

The Commission assigned the complaint to the Commission's chief administrative law judge, and the Ports Authority filed a motion to dismiss the complaint asserting, *inter alia*, its sovereign immunity.[5] Because the Ports Authority is indisputably an arm of the State of South Carolina, Chief Administrative Law Judge Kline granted the Ports Authority's motion and dismissed the complaint on January 5, 2000. Judge Kline concluded that the Commission could avoid all sovereign immunity issues by invoking its authority to institute its own investigation into the alleged

[4] LLOYD'S REGISTER OF SHIPPING, [Vol. P-Z] REGISTER OF SHIPS 1999-2000 at 1497 (1999). The M/V TROPIC SEA is also known as the M/V TROPICANA, the classification of which appears in this widely used industry ship register.

[5] The Ports Authority also challenged the Commission's authority to review the state regulation of gambling vessels under the Johnson Act and raised other jurisdictional issues.

violations, or the Commission could refer the case to the Commission's Bureau of Enforcement for its recommendation. Pet. App. C, 39a-62a.

Notwithstanding his recommendation, the Commission, *sua sponte,* reviewed and reversed Judge Kline's decision in a closed Commission meeting without briefing or a hearing. Pet. App. B, 27a-38a. The Ports Authority filed a timely petition for review with the United States Court of Appeals for the Fourth Circuit. The United States and the Commission appeared as respondents before the Fourth Circuit and took different positions on the enforceability of Commission orders against an unconsenting state. Below, the United States argued that the complainant could file and prosecute a suit with the Commission against an unconsenting state, but conceded that any reparations order issued by the Commission would not be enforceable in a federal district court. The Commission disagreed with the United States, arguing instead that its orders are fully enforceable against a state.

In a unanimous opinion written by Chief Judge Wilkinson, the Fourth Circuit reversed the Commission's judgment and remanded the case with instructions to dismiss. Pet. App. A at 25a. Relying upon Supreme Court precedent which holds that a state's sovereign immunity "transcends the forum in which the state is sued," the Fourth Circuit held that a state is entitled to assert its sovereign immunity in private complaints filed with federal administrative agencies. *Id.* at 6a. The Fourth Circuit's holding is also consistent with the Tenth Circuit's holding that both the United States and a state are entitled to assert sovereign immunity in a federal administrative agency's adjudication of a private complaint. *Hensel*, 38 F.3d at 508-10.

REASONS FOR DENYING THE WRIT

The Supreme Court should deny the Commission's petition for a writ of certiorari for three reasons. First, the Fourth Circuit's decision correctly interprets and applies Supreme Court precedent. The decision upholds the doctrine of sovereign immunity, embodied in the Eleventh Amendment, and avoids depriving the State of its constitutional guarantees. Congress' creation of a private "cause of action" for specific relief, damages, interest, and attorney's fees, whether it lies before a federal administrative tribunal or a judicial tribunal, must be governed by the principles and limitations set forth in our constitutional structure of government. The Commission's implicit argument that federal administrative tribunals hold greater authority than the judiciary that oversees them is manifestly untenable.

Second, this case does not affect any important federal maritime policy. Whatever the federal interest may be in regulating United States maritime commerce, this case does not implicate that interest. Instead, this case presents a controversy arising out of the regulation of gambling cruises, and a substantial question exists about whether the Commission has any jurisdiction over the underlying controversy. The Commission itself has not addressed this issue.

Third, neither the Commission nor the United States addressed the scope or the implications of the federal government's immunity in proceedings before federal administrative agencies although the petition would require this Court to consider the sovereign immunity of both the United States and the States. Thus, that issue has not been properly developed for review by this Court.

The Commission advances three arguments in support of its petition for a writ of certiorari: 1) the Fourth Circuit held a provision of the Shipping Act unconstitutional; 2) fundamental differences exist between adjudications by judicial and administrative tribunals for sovereign immunity pur-

poses; and 3) the Fourth Circuit's decision conflicts with decisions of other United States courts of appeals which have considered the question presented here. As discussed below, each argument is incorrect, and none provides any basis for this Court to grant the petition.

First, and contrary to the Commission's assertions, the Fourth Circuit's decision does not invalidate any act of Congress. Rather, the Fourth Circuit held that the Ports Authority is entitled to assert its sovereign immunity in a private complaint proceeding before the Commission—just as it would be entitled to do if a private complaint were filed in a federal or state court. If permitting a government defendant to assert its sovereign immunity under a general statutory cause of action (one not specifically directed against a government) renders that statute unconstitutional, then many statutory remedies would not pass constitutional scrutiny.

Second, the differences that exist between adjudications by judicial tribunals and adjudications by administrative agencies do not warrant different applications of a state's sovereign immunity. Although differences exist between purely judicial tribunals and administrative tribunals, the doctrine of sovereign immunity applies "regardless of the forum." *Alden*, 527 U.S. at 749. Despite the vast differences between a federal court and a state court, this Court still applied sovereign immunity in state court proceedings in *Alden*. Likewise, the Fourth Circuit properly found that South Carolina is not stripped of its sovereign immunity simply because the private party sued the State before an administrative body, instead of in a federal or state court.

The Commission argues that one key difference between its administrative tribunal and a judicial tribunal is that it is exercising its authority over maritime commerce. As previously addressed, this case does not implicate the federal interest in maritime commerce. This case presents a controversy arising out of the regulation of gambling vessels, which

is a matter reserved to the States. Finally, the result would not change if federal maritime commerce were implicated here. Sovereign immunity applies in the context of the admiralty jurisdiction of the courts, which does implicate the federal interest in maritime commerce.[6]

Third, the Fourth Circuit's decision does not conflict with decisions of other United States courts of appeals. The Tenth Circuit is the only other court of appeals to consider the precise question presented here, and its decision in *Hensel* is consistent with the Fourth Circuit's decision. Thus, the Commission erroneously states that "the court construed a significant constitutional principle [sovereign immunity] in a novel manner and applied it to a branch of the federal government to which it has never before applied." Petition at 9. Because the Tenth Circuit addressed the precise issue presented below in 1994, the Commission's attempt to dismiss *Hensel* as "not compelling" is unpersuasive. Petition at 21.

As is discussed in detail below, each of the foregoing reasons provides an independent ground for this Court to deny the Commission's petition for a writ of certiorari.

I. This Court Should Deny the Petition Because the Decision Below Faithfully Followed This Court's Precedent.

The Fourth Circuit correctly applied the "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution,—anomalous and unheard of when the constitution was adopted." *Hans,* 134 U.S. at 18. *Alden* establishes that the States entered the Union with their "sweeping" sovereignty intact, 527 U.S. at 745, and their immunity from suits filed by private citizens applies "regardless of the forum." *Id.* at 749.

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[6] *See infra* p. 19-20.

After conducting a careful review of both the Shipping Act and the Commission's procedures for implementing the Act, the Fourth Circuit reasoned: "The proceeding thus walks, talks, and squawks very much like a lawsuit. Its placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication." Pet. App. A at 15a. The Fourth Circuit held that "[w]hether the proceeding is formally called an administrative action, a lawsuit, or an adjudication does not matter. The fundamental fact, which respondents cannot escape, is that this proceeding requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state." *Id.* at 14a. Further, while noting the Commission's limited powers to enforce its non-reparation orders independently, the court rejected the argument that "the agency adjudication is so meaningless as to permit a private party to subject an unconsenting state to agency proceedings *because of* the adjudication's very emptiness." *Id.* at 17a. Rather,

> [a]ll parties, and certainly political entities such as states, have an interest in avoiding the stigma that attaches even to an unenforceable default judgment. Moreover, a state offends an agency that has plenary jurisdiction over its ports at its own peril. Indeed, the FMC may fine a state up to $25,000 per day for failure to comply with a Commission order.

Id. The Fourth Circuit's holding in this case is consistent with the form of government established by the United States Constitution, the doctrine of sovereign immunity embodied in the Eleventh Amendment, and this Court's sovereign immunity jurisprudence.

II. This Court Should Deny the Petition Because This Case Does Not Involve United States Oceanborne Foreign Commerce.

This case involves the regulation of gambling vessels, power over which federal law expressly grants to the States.

In the proceeding before the Commission, the complainant sought review of the reasonableness of the Ports Authority's decision to prohibit it from berthing the M/V TROPIC SEA at Charleston's harbor. The complainant claimed that the Ports Authority's decision was unreasonable, invoking the Commission's power to ensure fair access to United States ports for oceangoing vessels engaged in "common carriage of goods by water in the foreign commerce of the United States." Shipping Act § 2(1), 46 U.S.C.A. app. § 1701(1) (West Supp. 2001).

This case does not involve the common carriage of goods in United States foreign commerce.[7] Instead, the dispute involves entirely domestic concerns of a South Carolina citizen and the State of South Carolina. The private party challenges the lawfulness of South Carolina's police power to regulate gambling vessels—oversight authority the Commission does not possess and has never claimed to possess. The Johnson Act expressly states that federal law does not preempt state laws that prohibit or regulate gambling activities within their borders. 15 U.S.C.A. § 1175 (West 1998). The Act withdraws federal regulation over gambling conducted in state territorial waters and permits the States to regulate gambling on vessels, even for voyages outside of a state's territorial waters. *Id.* Therefore, the federal government has no interest in a vessel's alleged right to operate gambling cruises from a state's port, and it certainly has no "unique" federal maritime interest in this issue.

The Commission's decision below analyzed only the sovereign immunity issue and failed to consider whether the Johnson Act forecloses its jurisdiction over this case. This is a substantial question because the true nature of Maritime Services' complaint is that it seeks federal agency review of state actions in an area Congress left expressly to the States.

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[7] Although the M/V TROPIC SEA is registered in the Bahamas, there are no registry-related issues in the case.

Because the Commission did not address this issue, it remains unresolved and the Court should deny certiorari in this case.

Even if this case involved a compelling national interest, the Commission should be prepared to assign its staff to investigate whether enforcement action against the Ports Authority is warranted under the Shipping Act. *See Alden*, 527 U.S. at 759-60 ("[t]he National Government must itself deem the case of sufficient importance to take action against the State"). The well-recognized limits on a state's sovereign immunity, along with the Shipping Act, allow the Commission to conduct its own investigations into alleged violations of the Shipping Act by the States. Thus, the Fourth Circuit's decision does not impair either the Commission's authority or its ability to regulate state-run ports nor does it leave state-run ports immune from Commission regulation. Instead, the Commission seeks to override South Carolina's immunity from suit and to allow a privately initiated complaint to regulate the conduct of the State.

III. This Court Should Deny the Petition Because Neither The United States nor the Commission Analyzed the Scope of Sovereign Immunity Asserted by the United States Before Executive Agencies.

Sovereign immunity serves the same purpose under the Constitution whether it applies to one of the several states or to the United States itself. As the United States contended in *Hensel*, "[s]overeign immunity bars an action if, among other things, the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." Brief of the United States Department of Justice in *Hensel* on behalf of Respondent Oklahoma City Veterans Affairs Medical Center at 19-20 (citations and quotation marks omitted) (Resp. App. at 4a-6a); *see also Hensel*, 38 F.3d at 509 (sovereign

immunity protects the United States from judgments that would require an expenditure from public funds, interfere with public administration, restrain the Government from acting, or compel it to act). Similarly, as applied to the States, sovereign immunity prevents a state from "being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the state administers on the public's behalf." *Alden*, 527 U.S. at 749.

The United States has expressly asserted sovereign immunity as a bar to administrative adjudication seeking to compel government action and seeking monetary damages. This case involves the simple question of whether sovereign immunity applies to private complaints filed before federal administrative agencies. The United States took the position in *Hensel* that it does. No basis exists for distinguishing the United States Government's right to assert its sovereign immunity in federal administrative proceedings from a state's right to do the same. Rather, federalism and constitutional guarantees require the doctrine be applied in a manner consistent with a state's status as residuary sovereigns and joint participants in governing this Nation. *See Alden*, 527 U.S. at 748.

Under the Shipping Act, states are included within the definition of the "United States." *See* Shipping Act § 3(25), 46 U.S.C.A. app. § 1702(25) (West Supp. 2001) ("'United States' includes the several States"). Accordingly, if this Court rules on South Carolina's ability to assert its immunity in private actions before the Commission, the decision will affect not only the several States, but also the ability of the United States to assert its immunity before this administrative agency. As stated in *Alden*,

> "[i]t is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional

system recognizing the essential sovereignty of the States, *we are reluctant to conclude that the States are not entitled to a reciprocal privilege*."

Alden, 527 U.S. at 749-50 (emphasis added).

The Fourth Circuit recognized the importance of understanding the scope of the United States Government's immunity, and during oral argument, the court asked counsel for the United States to address the matter. Counsel was unable to answer the question, and the Fourth Circuit did not address the issue in its decision. Because a ruling in this case will affect the interests of the United States and because the Fourth Circuit was unable to make a complete analysis of those interests, this Court should deny the petition for a writ of certiorari.

IV. This Court Should Deny the Petition Because the Commission's Arguments Are Without Merit.

A. The Shipping Act Does Not Expressly Authorize Private Suits Against the States, Therefore, the Constitutionality of the Shipping Act Is Not at Issue.

The Commission argues that the Fourth Circuit's decision holds a provision of the Shipping Act unconstitutional. Petition at 9. However, the Commission fails to identify which provision of the Act the Fourth Circuit allegedly held unconstitutional. More importantly, the Commission never identifies any provision of the Shipping Act that provides a statement of congressional intent to abrogate the States' sovereign immunity.

For a private citizen to sue an unconsenting state for alleged statutory violations, Congress must have validly abrogated a state's immunity in the statute. To determine whether Congress validly abrogated a state's immunity, a two-fold analysis ensues. First, the statute must contain an unequivocal expression of Congress' intent to abrogate the

States' sovereign immunity. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (Congress' intent must be unmistakably clear). Second, Congress must have acted pursuant to a valid exercise of its powers when it expressed its intent to abrogate the States' immunity. *See, e.g., Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 962 (2001).

As to the first prong, the Shipping Act does not refer either to the Eleventh Amendment or to the States' sovereign immunity, as this Court's decisions require. Because no statutory language in the Shipping Act evidences Congress' intent to abrogate the States' immunity, the Commission gives only a single citation to the 1916 Congressional Record of a different statute in an unpersuasive effort to show Congress' intent to abrogate the States' sovereign immunity.[8] Petition at 10. This single citation to the legislative history of a predecessor statute does not even address the current Shipping Act and does not provide the "unmistakable language in the statute itself," necessary to demonstrate Congress' intent to subject unconsenting states to private suits

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[8] A review of the applicable provisions of the Shipping Act explains the Commission's silence as to which provision allegedly abrogates the States' immunity and is allegedly unconstitutional under the Fourth Circuit's decision. Section 3(14) of the Shipping Act defines a "marine terminal operator" as "a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier." 46 U.S.C.A. app. § 1702(14) (West Supp. 2001). "A 'person' includes individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country." Shipping Act § 3(18), 46 U.S.C.A. app. § 1702(18) (West Supp. 2001). Congress has not expressed its intent to abrogate the States' sovereign immunity anywhere in these provisions. The lack of congressional intent to abrogate sovereign immunity is further highlighted by the fact that Congress specifically included "the several States" within the definition of "United States." *See* Shipping Act § 3(25), 46 U.S.C.A. app. § 1702(25) (West Supp. 2001).

for monetary damages before an administrative agency such as the Commission. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985). In reality, the legislative history upon which the Commission relies is a small portion of the floor debate that touched, *in haec verba*, only on the regulation of "municipal" ports, without even discussing state-owned ports. 53 Cong. Rec. 8276 (1916).

Because Congress never expressed its intent to abrogate the states' immunity in the Shipping Act, neither the Commission nor the court below addressed the second prong of the analysis.[9] The record thus remains undeveloped with regard to congressional power to abrogate a state's immunity through the Shipping Act.

Only a provision in the Shipping Act that expressed Congress' clear intent to abrogate the State's immunity would be unconstitutional under the Fourth Circuit's decision. Because no such provision exists in the Shipping Act, the Fourth Circuit did not invalidate any congressional act, and this Court's attention is unwarranted.

B. This Court Has Explicitly Rejected the Commission's Assertion that Federal Maritime Interests Can Trump the United States Constitution.

Even if this case involved the Commission's alleged "unique federal interest" (Petition at 16) over maritime commerce, the federal interest would not override a state's sovereign immunity. In *Alden*, this Court rejected "any contention that substantive federal law by its own force

[9] Congress may, for example, validly abrogate the States' immunity when acting pursuant to section 5 of the Fourteenth Amendment. *See, e.g., Garrett*, 121 S. Ct. at 962 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)). The Petition points to no constitutional provision on which Congress could lawfully have relied to abrogate a state's immunity in the regulation of the United States oceanborne commerce.

necessarily overrides" state sovereign immunity. *Alden*, 527 U.S. at 732. *Alden* further teaches that when a state asserts its immunity, the focus must be to implement the law "in a manner consistent with the constitutional sovereignty of the States." *Id.* Accordingly, although Congress may retain complete law-making authority in a particular area (*i.e.*, United States oceanborne foreign commerce), the doctrine of sovereign immunity "prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996) (sovereign immunity barred suit against the State of Florida by Indian tribes); *see also Breard v. Greene*, 523 U.S. 371 (1998) (sovereign immunity barred suit against State of Virginia for alleged violation of international treaty).

This Court previously rejected the identical argument made by the Commission that exempting states from suits by private parties would somehow destroy federal regulation of oceanborne foreign commerce. *See In re New York*, 256 U.S. 490 (1921). In that admiralty case, this Court respected the State of New York's sovereign immunity and held: "It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction." *Id.* at 503. "In the sovereign-immunity context, moreover, '[e]venhandness' between individuals and States is not to be expected: 'The constitutional role of the States sets them apart from other employers and defendants.'" *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 685-86 (1999) (quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 477 (1987)).

A strong federal interest in a particular subject matter cannot determine the application of sovereign immunity to a suit, as this Court held, regardless of whether the case involves a matter of exclusive federal interest–like Indian

tribes, *Seminole Tribe of Florida*, 517 U.S. at 72, or state court jurisdiction, *Alden*, 527 U.S. at 754. Accordingly, even the existence of a strong federal interest, as in maritime commerce, cannot justify overriding a state's sovereign immunity.[10]

Moreover, sovereign immunity does not preclude the federal government from protecting its interests because the States do not enjoy immunity from suits filed by the United States. Thus, the Commission can protect its alleged "unique federal interest" by assigning its staff to initiate an enforcement action against a state under the Shipping Act. *See Alden*, 527 U.S. at 759-60 ("the National Government must itself deem the case of sufficient importance to take action against the State"). The Commission declined to take action here.

The Commission's assertion of a "unique federal interest" in regulating maritime commerce as a ground for overriding a state's sovereign immunity thus merely repeats arguments previously made and rejected by this Court. *See, e.g., Seminole Tribe of Florida*, 517 U.S. at 44; *see also In re New York*, 256 U.S. at 490. For this reason, the Court should deny the Commission's petition for a writ of certiorari.

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[10] "Constitutional rights would be of little value if they could be . . . indirectly denied." *United States Term Limits, Inc. v. Thorton*, 514 U.S. 779, 829 (1995) (citations omitted). Accordingly, a requirement imposed by the Constitution is "equally applicable whether jurisdiction be exercised by a legislative court or a constitutional court." *Williams v. United States*, 289 U.S. 553, 581 (1933).

C. No Conflict Exists Among the United States Courts of Appeals Regarding State Sovereign Immunity.

1. *Current Appellate Court Decisions Uniformly Apply the Doctrine of Sovereign Immunity in Federal Administrative Adjudications filed by Private Parties against Unconsenting States.*

The Fourth Circuit's decision is consistent with the Tenth Circuit's decision in *Hensel*. In *Hensel*, an anesthesiologist filed a discrimination claim against the University of Oklahoma Health Services Center (a state entity) and the Oklahoma City Veterans Affairs Medical Center (a federal entity). The anesthesiologist claimed she was not hired because she was a United States citizen. *Hensel*, 38 F.3d at 506. The anesthesiologist filed her complaint with the Department of Justice Executive Office of Immigration Review, *id.* at 506-07, seeking an order requiring the state hospital to hire her and place her with the federal hospital. *Id.* at 509. Both the state and federal entities asserted sovereign immunity from the anesthesiologist's claims. *Id.* at 507. Applying this Court's decisions, the Tenth Circuit held that the doctrine of sovereign immunity barred the anesthesiologist's claims filed as to both the State of Oklahoma and the United States. *Id.* at 508-10.

A review of recent federal decisions reflects a universal understanding among the lower federal courts that sovereign immunity prohibits private persons from suing states before federal administrative agencies. *See Conn. Dep't of Envtl. Prot. v. OSHA*, 138 F. Supp. 2d 285 (D. Conn. 2001) (sovereign immunity prevented federal agency from adjudicating a whistleblower complaint filed by a state employee); *Fla. v. United States*, 133 F. Supp. 2d 1280, 1288 (N.D. Fla. 2001) ("If state sovereignty prohibits either the Congress under Article I of the Constitution or the federal courts under Article III from subjecting the state to claims of private

individuals, then surely the result should be no different for an agency created not by the Constitution itself but only by Congress under its Article I powers."); *Ohio Envtl. Prot. Agency v. Dep't of Labor*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000) (sovereign immunity applies to federal agency adjudicatory proceedings); *R.I. Dep't of Envtl. Mgmt. v. Dep't of Labor*, 115 F. Supp. 2d 269 (D.R.I. 2000) (a state's sovereign immunity protects it from prosecution of private complaints before OSHA). These lower court decisions uniformly apply the doctrine of sovereign immunity to bar private causes of action asserted before federal administrative agencies against unconsenting states. A conflict of authority simply does not exist.

2. *Cases Cited by the Commission Do Not Demonstrate a Split of Authority among the United States Courts of Appeals.*

The four cases cited by the Commission purporting to establish a split of authority among various courts of appeals rely either upon a waiver of sovereign immunity by the state or upon case law that is inapposite and this Court has overruled. As shown below, one case involves a proceeding brought by the federal government, not a private party; two cases involve waivers of immunity; and the fourth case involves the issue of Congressional intent to abrogate, which is not at issue here, and was implicitly overruled by this Court's decisions in *Seminole Tribe* and *Alden*. Thus, these cases do not present a circuit split on the question presented.

The Commission cites *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 567 (8th Cir. 1980), to support its position that the Eleventh Amendment does not bar administrative action against state entities. However, as explained by the court in *Rhode Island*, 115 F. Supp. 2d at 275-76, *Ellis Fischel* is inapposite because the Secretary of Labor, not a private citizen, initiated the administrative proceedings against the hospital. In *Ellis Fischel*, the Eighth Circuit

recognized that "[c]ourts have found no eleventh amendment bar to actions brought *by* federal administrative agencies pursuant to complaints of private individuals." *Ellis Fischel*, 629 F.2d at 567 (emphasis added).

Unlike *Ellis Fischel*, the instant case does not involve proceedings against the Ports Authority brought by the Commission. Instead, it involves a suit filed by a private party directly against the State. This Court has clearly explained the significant difference between an action initiated and prosecuted by a federal agency based on information received from a private party, and an action initiated and prosecuted by the private party himself.[11] Thus, *Ellis Fischel* does not provide authority for allowing a private party to prosecute claims against unconsenting states before federal administrative agencies.

The Eighth Circuit in *Ellis Fischel* relied upon *Brennan v. Iowa*, 494 F.2d 100 (8th Cir. 1974), in which the Secretary of Labor commenced an action against the State of Iowa in federal court. This suit by the Secretary of Labor, brought in the public interest, was a suit by the United States. *Id.* at 103. Therefore, the suit was not barred by the Eleventh Amendment or the doctrine of sovereign immunity. *Id.* at 104. Further, the court found that the State's activities were in "interstate commerce." *Id.* at 103. The "interstate com-

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[11] In *Alden*, this Court aptly recognized:

> The difference between a suit by the United States on behalf of [a private party] and a suit by the [private party] implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second.

Alden, 527 U.S. at 759-60. Thus, where a statute allows the United States to file suit against a State on behalf of a private party, the State still has not consented to a suit filed by that party directly nor has Congress abrogated the States' immunity from suits filed by private parties.

merce" finding was significant because at the time the court decided *Brennan*, this Court's decision in *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964) controlled. In *Parden*, the statute at issue subjected all rail common carriers engaging in interstate commerce to suit, and the Court held that by operating a railroad in interstate commerce, the State constructively waived its sovereign immunity and consented to suit. *Id.* at 192. However, this Court expressly overruled *Parden* in *College Savings Bank*. 527 U.S. at 680-83; *see also Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987) (overruling *Parden* to the extent it is inconsistent with the requirement that Congress' abrogation of a state's immunity "must be expressed in unmistakably clear language"). Therefore, *Brennan* does not support the Commission's argument.

The Eighth Circuit in *Ellis Fischel* also relied upon *Marshall v. A & M Consolidated Independent School District*, 605 F.2d 186 (5th Cir. 1979), in which the Secretary of Labor sued a Texas public school district. The plaintiff was the United States, not a private party, and the Eleventh Amendment did not apply. *Id.* at 188. Further, as pointed out in the concurring opinion, the school district was not a state entity for purposes of the Eleventh Amendment, and under *Parden*'s then-controlling rationale, the Commerce Clause would have permitted suit even if the Eleventh Amendment applied. *Id.* at 191 (Clark, J., concurring).

The Eighth Circuit also relied upon *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), which does not support either the holding in *Ellis Fischel* or the Commission's argument in the present case. Again, that case is based almost entirely upon the overturned holding of *Parden*. The Court only referred to the activities of an administrative agency when it noted that the Secretary of Labor had the power to bring suit in federal court and that the Constitution did not bar such a suit by the United States

against a state. *Id.* at 286. This Court found no congressional intent to abrogate the Eleventh Amendment under the Act and stated: "The policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor." *Id.* Similarly, the Commission can implement the policy of the Shipping Act, as to the States, through its power to investigate state maritime practices and litigate Shipping Act violations.

Finally, the Eighth Circuit in *Ellis Fischel* relied upon *United States v. Mississippi*, 380 U.S. 128 (1965), in which the United States, acting pursuant to the Fourteenth and Fifteenth Amendments, sued the State of Mississippi for hampering and destroying the right of black Americans to vote. First, the Eleventh Amendment was not even at issue because the United States, not a private party, sued the State. *Id.* at 138-141. Second, the suit was based on the Fourteenth and Fifteenth Amendments and statutes enacted pursuant to those amendments. *Id.* at 130. Therefore, the Eleventh Amendment would not bar such a suit in any event. Third, the case contains no mention or hint of administrative action. *Mississippi* does not support either the Eighth Circuit's finding that the Eleventh Amendment is not a bar to administrative action or the Commission's argument that the Eleventh Amendment does not apply to private complaint proceedings before federal agencies.

According to the Eighth Circuit, implicit in these four cases is

> the conclusion that administrative action against states pursuant to individual complaints does not run afoul of the eleventh amendment. For it would be absurd to hold that the eleventh amendment did not bar the Secretary from bringing a lawsuit, but did bar the Secretary from

> proceeding administratively to determine if the lawsuit was warranted.[12]

Ellis Fischel, 629 F.2d at 567. However, the Eighth Circuit's implicit conclusion that the United States may investigate a violation does not support a conclusion that private parties may litigate claims against unconsenting States. Although the United States may sue a state because it is "inherent in the constitutional plan," *Monaco v. Mississippi*, 292 U.S. 313, 329 (1934), the authority of the United States to investigate and sue a state does not grant private parties similar rights.[13]

This Court has expressly rejected the United States' authority over the states as a basis for allowing private suits against the states.

> The consent, "inherent in the convention," to suit by the United States—at the instance and under the control of

[12] In *Ellis Fischel*, the statute at issue authorized the Secretary to "file a civil action in the United States district court in which the violation was found to occur to enforce such order." *Ellis Fischel*, 629 F.2d at 568 (citing 42 U.S.C. § 5851(d)). The Shipping Act does not authorize the Commission or any other federal entity to file an action to enforce a reparation order.

[13] In discussing the States' sovereign immunity, this Court quoted "the following profound remarks" from the Federalist Papers in *Hans v. Louisiana*, 134 U.S. 1, 12 (1890):

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states . . . . [T]here is no color to pretend that the state governments would, by the adoption of that [Constitutional] plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."

Id. at 13 (quoting THE FEDERALIST NO. 81, at 567 (Alexander Hamilton) (H. Dawson ed. 1876)).

> responsible federal officials—is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself.

Blatchford v. Native Village of Noatak, 501 U.S. 775, 785 (1991). Although the Commission has the authority to investigate state compliance with federal law, the federal authority to investigate and sue on behalf of the United States does not permit a private litigant to sue the Ports Authority before the Commission.[14]

Thus, the Commission is free to initiate an investigation into the State of South Carolina's actions, but the Commission may not rely upon privately initiated complaints to regulate a state. *See* Pet. App. A at 23a ("The fact that sovereign immunity applies to private proceedings means only that the federal government, not a private party, must vindicate the federal interest when a state is involved"). *Ellis Fischel* merely supports the Commission's authority to investigate states and to bring its own actions against states, but does not support the Commission's asserted authority to adjudicate private suits against the States. The Commission's authority to investigate and commence litigation on behalf of the United States was explicitly recognized not only by the Fourth Circuit, but also by the Ports Authority before the administrative law judge, the Commission, and the Fourth Circuit. "In short, the federal government itself [must] 'deem the case of sufficient importance to take action against the State.'" Pet. App. A at 24a (citing *Alden*, 527 U.S. at 759-60). "What Congress simply cannot do under its Article I power is subject an unconsenting state to an adversarial

[14] The Bureau of Enforcement is not a party to this case. *See* Rule 42, Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.42 (2000). Therefore, this is a suit by a private party against a state entity, and the Eleventh Amendment applies.

proceeding brought by a private party." *Id.* The Commission's interpretation of *Ellis Fischel* does not accurately reflect Eleventh Amendment and sovereign immunity jurisprudence nor does the case represent a circuit court conflict.

In its petition, the Commission contends that several cases dealing with the Randolph-Sheppard Vending Stand Act establish a conflict among the courts of appeals. Petition at 18-20. They do not. The Vending Stand Act requires each state agency, before accepting federal funds, to agree to resolve disputes by binding arbitration. 20 U.S.C.A. § 107b(6) (West 2000). Thus, two of the cases cited by the Commission hold that the State entity waived its Eleventh Amendment immunity by agreeing to binding arbitration. *See Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997) ("The overwhelming implication of the statute is that by agreeing to participate in the Randolph-Sheppard program, states have waived their sovereign immunity to enforcement of such awards in federal court."); *Del. Dep't of Health & Soc. Servs. v. United States Dep't of Educ.*, 772 F.2d 1123, 1137 (3d Cir. 1985) (holding that Delaware waived its immunity when it voluntarily applied to participate in the Randolph-Sheppard program after full notice that the Act required an agreement to arbitrate disputes). The Ports Authority has not waived its immunity, and the Commission does not contend that it has.

In the third case cited by the Commission, *Tennessee Department of Human Services v. United States Department of Education*, 979 F.2d 1162 (6th Cir.1992), the Sixth Circuit held that the Eleventh Amendment does not apply to arbitration proceedings because the Amendment applies only to Article III proceedings. *Id.* at 1166-67. However, this Court expressly rejected that position in *Alden* when it held that the Eleventh Amendment applies in state courts. *Alden*, 527 U.S. at 754. The Sixth Circuit in *Tennessee* also considered whether Congress had expressed an intent to abrogate

a state's immunity when legislating pursuant to the Commerce Clause in Article I. *Tennessee Dep't of Human Servs.*, 979 F.2d at 1166, 1168 (citing *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)). However, this Court overruled *Union Gas* in *Seminole Tribe* when it held that Article I does not authorize Congress to abrogate the States' sovereign immunity. *Seminole Tribe of Florida*, 517 U.S. at 63-73. Whatever the continuing validity of *Tennessee* in light of this Court's decisions in *Alden* and *Seminole Tribe*, the Commission has presented no evidence that Congress intended to abrogate the States' immunity.[15]

In summary, the Randolph-Sheppard Vending Stand Act cases the Commission cites do not support its argument that private individuals can sue unconsenting states in Article I tribunals. Two of those cases are inapplicable because they involve implied waivers of sovereign immunity, and one is inapplicable because it is inapposite and predates current Supreme Court precedent delineating the scope of a state's sovereign immunity. Thus, the Commission's petition fails to establish the existence of a split in legal authority.

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[15] *See infra* pp. 17-18 for a discussion of legislative history.

CONCLUSION

For the foregoing reasons, the Court should deny the Commission's petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

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APPENDICES

APPENDIX A

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE CHAPTER 24— TRANSPORTATION OF GAMBLING DEVICES

§ 1175. Specific jurisdictions within which manufacturing, repairing, selling, possessing, etc., prohibited; exceptions.

(a) General rule. It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18, including on a vessel documented under chapter 121 of Title 46 or documented under the laws of a foreign country.

(b) Exception.

(1) In general. Except for a voyage or a segment of a voyage that begins and ends in the State of Hawaii, or as provided in paragraph (2), this section does not prohibit—

(A) the repair, transport, possession, or use of a gambling device on a vessel that is not within the boundaries of any State or possession of the United States;

(B) the transport or possession, on a voyage, of a gambling device on a vessel that is within the boundaries of any State or possession of the United States, if—

(i) use of the gambling device on a portion of that voyage is, by reason of subparagraph (A), not a violation of this section; and

(ii) the gambling device remains on board that vessel while the vessel is within the boundaries of that State or possession; or

(C) the repair, transport, possession, or use of a gambling device on a vessel on a voyage that begins in the State of Indiana and that does not leave the territorial jurisdiction of that State, including such a voyage on Lake Michigan.

(2) Application to certain voyages

(A) General rule. Paragraph (1)(A) does not apply to the repair or use of a gambling device on a vessel that is on a voyage or segment of a voyage described in subparagraph (B) of this paragraph if the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage or segment.

(B) Voyage and segment described. A voyage or segment of a voyage referred to in subparagraph (A) is a voyage or segment, respectively—

(i) that begins and ends in the same State or possession of the United States, and

(ii) during which the vessel does not make an intervening stop within the boundaries of another State or possession of the United States or a foreign country.

(C) Exclusion of certain voyages and segments. Except for a voyage or segment of a voyage that occurs within the boundaries of the State of Hawaii, a voyage or segment of a voyage is not described in subparagraph (B) if such voyage or segment includes or consists of a segment—

(i) that begins and ends in the same State;

(ii) that is part of a voyage to another State or to a foreign country; and

(iii) in which the vessel reaches the other State or foreign country within 3 days after leaving the State in which such segment begins.

(c) Exception.

(1) With respect to a vessel operating in Alaska, this section does not prohibit, nor may the State of Alaska make it a violation of law for there to occur, the repair, transport, possession, or use of any gambling device on board a vessel which provides sleeping accommodations for all of its passengers and that is on a voyage or segment of a voyage described in paragraph (2), except that such State may, within its boundaries—

(A) prohibit the use of a gambling device on a vessel while it is docked or anchored or while it is operating within 3 nautical miles of a port at which it is scheduled to call; and

(B) require the gambling devices to remain on board the vessel.

(2) A voyage referred to in paragraph (1) is a voyage that—

(A) includes a stop in Canada or in a State other than the State of Alaska;

(B) includes stops in at least 2 different ports situated in the State of Alaska; and

(C) is of at least 60 hours duration.

APPENDIX B

In *Hensel v. Office Of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994), the U.S. Department of Justice successfully asserted sovereign immunity on behalf of the United States and respondent Oklahoma City Veterans Affairs Medical Center. There, the context was a proceeding before an administrative tribunal of the same U.S. Department of Justice. The following is an excerpt from pages 18-20 of the brief for the United States:

ARGUMENT

I. THE IRCA [IMMIGRATION REFORM AND CONTROL ACT] DOES NOT WAIVE THE SOVEREIGN IMMUNITY OF THE UNITED STATES

In the administrative proceedings below, the VA Hospital argued that the ALJ did not have jurisdiction over it because the IRCA does not waive the federal government's sovereign immunity. *See* AR 2740-42, 4257-58. The ALJ found it unnecessary to address this issue given the holding that petitioner had failed to meet her burden in defending the motion for summary decision. AR 19.

Because the sovereign immunity issue determines this Court's jurisdiction with respect to the federal government, the court must decide it even though the ALJ declined to do so. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). Moreover, this Court can affirm on any ground supported by the record even if that ground did not form the basis of the ALJ's decision. *Aspinall v. United States*, 984 F.2d 355, 357 (10th Cir. 1993). This Court reviews the sovereign immunity issue *de novo*. *Sierra Club v. Lujan*, 972 F.2d 312, 314 (10th Cir. 1992).

"It has long been established that * * * the United States, as sovereign, 'is immune from suit save as it consents to be sued

. . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *see* also *Sierra Club*, 972 F.2d at 314. Sovereign immunity extends to federal agencies and officers acting in their official capacities. *See Western Shoshone Business Council v. Babbit*, 1 F.3d 1052, 1058 (10th Cir. 1993); *see, e.g., Irwin v. Veterans Admin.*, 498 U.S. 89, 93-94 (1990).

Sovereign immunity bars an action if, among other things, "'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration' . . . or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Application of the IRCA to the VA Hospital in this case plainly would implicate sovereign immunity. Dr. Hensel seeks an order requiring the VA Hospital to hire her (AR 14), which would compel the government to act. She also seeks back pay (*id.*), which would expend itself on the United States Treasury. Therefore, sovereign immunity bars this action unless it has been waived.

As we show below, nothing in the text of the IRCA contains the unequivocal expression necessary to waive the federal government's sovereign immunity. The VA Medical Center, as a field office of the Veterans Administration,

cannot be hailed into court under the jurisdictional provisions of the IRCA.[1]

---

[1] We note that Respondent Oklahoma Health Services Center contends that it is protected by Eleventh Amendment immunity, and that the IRCA does not waive that immunity. This case involves a claim brought against Oklahoma by a private individual, and does not raise the issue of whether the United States could bring an action against a state for alleged violation of the IRCA. Accordingly, in resolving the state's argument for immunity in this case, the Court need not decide whether a claim brought by the Office of Special Counsel (a component of the Department of Justice) also would be barred by the Eleventh Amendment. With respect to any such claim, we note that the Supreme Court has stated that the Eleventh Amendment would not bar such an action. *See West Virginia v. United States*, 479 U.S. 305, 311-12 & n.4 (1987). In any event, the University's Eleventh Amendment argument does not affect our reliance upon and analysis of the sovereign immunity of the United States, which is broader than a state's Eleventh Amendment immunity. *See e.g., Missouri v. Jenkins*, 491 U.S. 274, 280-81 & n.3 (1989); *Reopell v. Commonwealth of Massachusetts*, 936 F.2d 12, 15 (1st Cir.), *cert. denied*, 112 S. Ct. 637 (1991).

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No. 01-46

In the Supreme Court of the United States

FEDERAL MARITIME COMMISSION, PETITIONER

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Amendment or constitutional principles of state sovereign immunity preclude the Federal Maritime Commission from adjudicating a private party's claim that a state agency has violated the Shipping Act of 1984.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Alden v. *Maine*, 527 U.S. 706 (1999)	7, 12, 13, 15-16
Ayers, In re, 123 U.S. 443 (1887)	13, 15
Bakelite Corp., Ex parte, 279 U.S. 438 (1929)	14
California v. *United States*, 320 U.S. 577 (1944)	2
Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986)	14-15
Connecticut Dep't of Envtl. Protection v. *Occupational Safety & Health Admin.*, 138 F. Supp. 2d 285 (D. Conn. 2001)	12
Delaware Dep't of Health & Social Serv. v. *United States Dep't of Educ.*, 772 F.2d 1123 (3d Cir. 1985)	11-12
Ellis Fischel State Cancer Hosp. v. *Marshall*, 629 F.2d 563 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981)	11
Florida v. *United States*, 133 F. Supp.2d 1280 (N.D. Fla. 2001), appeal pending, No. 01-12380-HH (11th Cir.)	12
Freytag v. *Commissioner of Internal Revenue*, 501 U.S. 868 (1991)	13
Granfinanciera, S.A. v. *Nordberg*, 492 U.S. 33 (1989)	14
International Union v. *Bagwell*, 512 U.S. 821 (1994)	15
Johnson v. *Robison*, 415 U.S. 361 (1974)	19

Cases—Continued: Page

Kentucky v. *Graham*, 473 U.S. 159 (1985) 17
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) 14
Northern Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 14
Ohio Envtl. Protection Agency v. *United States*, 121 F. Supp.2d 1155 (S.D. Ohio 2000), appeal pending, No. 01-3215 (6th Cir.) 12
Plaquemines Port, Harbor & Terminal Dist. v. *FMC*, 838 F.2d 536 (D.C. Cir. 1988) 2, 3
Premo v. *Martin*, 119 F.3d 764 (9th Cir. 1997), cert. denied, 522 U.S. 1147 (1998) 11
Puerto Rico Aduedact & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 17
Puerto Rico Ports Auth. v. *FMC*, 919 F.2d 799 (1st Cir. 1990) 2, 3, 17
Rhode Island Dep't of Env't Mgmt. v. *United States*, 115 F. Supp. 2d 269 (D.R.I. 2000), appeal pending, No. 01-1543 (1st Cir.) 12
Ristow v. *South Carolina Ports Auth.*, 58 F.3d 1051 (4th Cir. 1995) 6
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 7, 17
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 18
Tennessee Dep't of Human Serv. v. *United States Dep't of Educ.*, 979 F.2d 1162 (6th Cir. 1992) 11
Thomas v. *Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985) 14
Young, Ex parte, 209 U.S. 123 (1908) 17

Constitution, statutes, regulations and rule:

U.S. Const.:
Amend. XI ..... *passim*
Amend. XIV, § 5 10
Hobbs Administrative Orders Judicial Review Act, 28 U.S.C. 2341 *et seq.*:
28 U.S.C. 2344 9
28 U.S.C. 2348 9

Statutes, regulations and rule—Continued: Page

28 U.S.C. 2350(a) 1
Shipping Act of 1984, 42 U.S.C. app. 1701 *et seq.*:
§ 10(b)(10), 46 U.S.C. app. 1709(b)(10) 6
§ 10(d)(1), 46 U.S.C. app. 1709(d)(1) 3, 5
§ 10(d)(4), 46 U.S.C. app. 1709(d)(4) 6
§ 11(a), 46 U.S.C. app. 1710(a) 3
§ 11(b), 46 U.S.C. app. 1710(b) 3, 5, 6
§ 11(c), 46 U.S.C. app. 1710(c) 4, 5
§ 11(f), 46 U.S.C. app. 1710(f) 4, 5
§ 11(g), 46 U.S.C. app. 1710(g) 4, 5
§ 11(h)(1), 46 U.S.C. app. 1710(h)(1) 4
§ 11(h)(2), 46 U.S.C. app. 1710(h)(2) 4
§ 12(a), 46 U.S.C. app. 1711(a) 4
§ 13(a), 46 U.S.C. app. 1712(a) 21
§ 13(e), 46 U.S.C. app. 1712(e) 5, 21
§ 14, 46 U.S.C. app. 1713 21
§ 14(a), 46 U.S.C. app. 1713(a) 4
§ 14(c), 46 U.S.C. app. 1713(c) 5, 15
§ 14(d), 46 U.S.C. app. 1713(d) 15
§ 14(d)(1), 46 U.S.C. app. 1713(d)(1) 5
28 U.S.C. 1254(2) (1982) 18
45 C.F.R.:
Section 502.142 4
Section 502.223 4
Section 502.227 ..... 4, 5
Section 502.227(a)(5) 5
Section 502.227(a)(b) 5
Sup. Ct. R. 12.6 9

Miscellaneous:

H.R. Rep. No. 53, 98th Cong., 2d Sess. Pt. 1 (1984) 3
R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 18

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 243 F.3d 165. The opinion of the Federal Maritime Commission (Pet. App. 27a-38a) is not yet reported. The opinion of the Administrative Law Judge (Pet. App. 39a-62a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2001. On May 21, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 10, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2350(a).

STATEMENT

1. The Shipping Act of 1916 was designed to strengthen the United States shipping industry. See, *e.g.*, *Puerto Rico Ports Authority* v. *Federal Maritime Commission*, 919 F.2d 799, 806 (1st Cir. 1990); *Plaquemines Port, Harbor and Terminal District* v. *Federal Maritime Commission*, 838 F.2d 536, 542 (D.C. Cir. 1988). Congress determined that it was necessary to grant antitrust immunity to shipping cartels in order to enable the domestic shipping industry to survive and prosper in an international climate dominated by such cartels. See *Puerto Rico Ports Authority*, 919 F.2d at 807. To prevent abuses of that immunity, the 1916 Act prohibited carriers from engaging in discriminatory practices. See *ibid.* Congress chose to subject maritime terminal facilities to the same non-discrimination requirements in order to effectuate regulation of the carriers. See *ibid.*; *Plaquemines*, 838 F.2d at 542-543.

The Shipping Act of 1916 applied to, *inter alia*, "any person * * * carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities." *California* v. *United States*, 320 U.S. 577, 585 (1944). In *California*, this Court held that state and local instrumentalities engaged in the operation of terminal facilities were "person[s]" subject to the Shipping Act's substantive requirements. *Id.* at 585-586. The Court explained that "with so large a portion of the nation's dock facilities * * * owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *Ibid.*

The Shipping Act of 1916 was subsequently replaced by the Shipping Act of 1984. Section 10(d)(1) of the 1984 Act, 46 U.S.C. app. 1709(d)(1), "tracks the language of § 17 of the 1916 Act except that it substitutes the term 'marine terminal operator' for 'other person subject to this chapter'. The legislative history to the 1984 Act explains that the description of 'marine terminal operator' was taken directly from the 1916 Act's definition of 'other person subject to th[is] chapter'." *Puerto Rico Ports Authority*, 919 F.2d at 801 (citing H.R. Rep. No. 53, 98th Cong., 2d Sess. Pt. 1, at 29 (1984)). In light of Congress's evident intent to maintain in effect the scope of the prior Act's coverage, the courts of appeals in construing the scope of federal regulatory authority under the 1984 Act have recognized that "the intent behind, and prior interpretations of, the 1916 Act's provisions have continuing precedential force." *Plaquemines*, 838 F.2d at 542; accord *Puerto Rico Ports Authority*, 919 F.2d at 801.

2. Enforcement of the Shipping Act of 1984 is entrusted to the Federal Maritime Commission (FMC or Commission). The Act provides that "[a]ny person may file with the Commission a sworn complaint alleging a violation of this chapter * * * and may seek reparation for any injury caused to the complainant by that violation." 46 U.S.C. app. 1710(a). "The Commission shall furnish a copy of a complaint filed pursuant to subsection (a) of this section to the person named therein who shall, within a reasonable time specified by the Commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied, the Commission shall investigate it in an appropriate manner and make an appropriate order." 46 U.S.C. app. 1710(b). The Act further provides that "[t]he Commission, upon complaint or upon its own motion, may investigate any

conduct or agreement that it believes may be in violation of this chapter." 46 U.S.C. app. 1710(c). To aid in investigating alleged violations, the Act authorizes the FMC to issue subpoenas compelling the attendance of witnesses and the production of documents. See 46 U.S.C. app. 1711(a). The Act also authorizes the FMC to bring suit in federal district court to enjoin violations during the pendency of the agency proceedings. See 46 U.S.C. app. 1710(h)(1).[1]

Whether an investigation is undertaken on the FMC's own motion or prompted by the filing of a complaint, the FMC must provide an opportunity for a hearing before issuing an order relating to a Shipping Act violation or assessing penalties for such a violation. See 46 U.S.C. app. 1713(a); see also 46 U.S.C. app. 1710(g). The FMC must furnish to all parties a written report of any such investigation that states the FMC's conclusions, decisions, findings of fact, and its order. See 46 U.S.C. app. 1710(f). If an investigation is prompted by the filing of a formal complaint, the investigation takes the form of an adjudication. The FMC has delegated to administrative law judges (ALJs) the authority to make initial or recommended decisions. See 46 C.F.R. 502.223. The hearing is conducted in accordance with the provisions of the Administrative Procedure Act that govern adjudications. See 45 C.F.R. 502.142.

The FMC may review an ALJ decision, either on its own initiative or in response to a party's request. See 46 C.F.R. 502.227. If exceptions to an ALJ decision are filed, the decision becomes inoperative until the FMC

[1] The Act likewise permits a private complainant to sue in federal district court to enjoin a Shipping Act violation during the pendency of the FMC proceedings. See 46 U.S.C. app. 1710(h)(2).

decides the matter. See 46 C.F.R. 502.227(a)(5). In reviewing an ALJ decision, whether in response to exceptions or on its own initiative, the FMC has all of the powers that it would have in making the initial decision. See 46 C.F.R. 502.227(a)(6). If the FMC finds that a violation has occurred, it may issue a nonreparation order. See 46 U.S.C. app. 1710(c), 1710(f), 1713(c). If the investigation was prompted by the filing of a formal complaint, the FMC may also direct payment of reparation to the complainant. See 46 U.S.C. app. 1710(g).

3. Although the FMC has the power to issue such orders, none of its orders is enforceable without a federal court order. The Shipping Act sets out the mechanisms by which FMC orders may be enforced.

The Act authorizes the Attorney General of the United States to bring an action in federal district court to enforce various categories of FMC orders, including nonreparation orders and subpoenas. See 46 U.S.C. app. 1713(c). The Act also provides that "the Attorney General at the request of the Commission may seek to recover the amount [of civil penalties] assessed in an appropriate district court of the United States." 46 U.S.C. app. 1712(e).

In addition, the Act authorizes private parties to bring specified types of enforcement actions. The Act provides that "any party injured" by a violation of a nonreparation order or FMC subpoena "may seek enforcement by a United States district court having jurisdiction over the parties," 46 U.S.C. app. 1713(c), and it authorizes "the person to whom [a reparation award] was made" to seek enforcement of the order "in a United States district court having jurisdiction of the parties," 46 U.S.C. app. 1713(d)(1). The Act does not

authorize the Attorney General to bring an action to enforce a reparation order.

4. a. This proceeding began when South Carolina Maritime Services, Inc. (Maritime Services), a private company that operates vessels used for (*inter alia*) casino gambling, filed a complaint with the FMC. See Pet. App. 39a-41a. The complaint alleged that respondent South Carolina State Ports Authority had refused to give berthing space to a vessel owned by Maritime Services, based on a purported policy of refusing to berth ships whose primary purpose is gambling, while providing berthing space to other vessels offering comparable gambling services. See *id.* at 40a.

Maritime Services alleged that by refusing to give berthing space to its vessel, respondent had violated the non-discrimination requirements of Sections 10(b)(10) and 10(d)(4) of the Shipping Act of 1984, 46 U.S.C. app. 1709(b)(10) and 1709(d)(4). See Pet. App. 41a. The complaint asked that the FMC issue an order compelling respondent to pay reparation and to cease and desist the alleged violations of federal law. See *ibid.* The complaint also asked the FMC to file suit against respondent to obtain a preliminary injunction. See *id.* at 41a n.1.

b. Respondent has previously been held to be an arm of the State of South Carolina protected by the State's sovereign immunity. Pet. App. 3a (citing *Ristow* v. *South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir. 1995)). Respondent accordingly moved to dismiss the administrative complaint, invoking the State's Eleventh Amendment immunity. An ALJ granted the motion to dismiss. *Id.* at 39a-62a. The ALJ concluded that the principles of state sovereign immunity reflected in the Eleventh Amendment apply to private complaint proceedings against a state entity before a

federal agency adjudicator. *Id.* at 59a-62a. The ALJ also suggested that a private complaint proceeding would in any event be futile, since a Shipping Act reparation order can be enforced only through a suit brought by "the person to whom the award was made," and a federal district court would lack jurisdiction if a private party brought such a suit against a state agency. *Id.* at 59a n.8. The ALJ noted, however, that "the Commission has the authority to look into allegations of Shipping Act violations and enforce the Shipping Act by means other than *private* complaints," *id.* at 60a, including enforcement proceedings brought by the FMC itself, see *id.* at 60a-61a.

c. The FMC reversed. Pet. App. 27a-38a. The FMC stated that "[t]he Supreme Court has defined the terms of state sovereign immunity, and this definition does not extend to administrative proceedings. All of the recent Supreme Court cases addressing state sovereign immunity involve proceedings against states in judicial tribunals, not before administrative agencies." *Id.* at 31a. After reviewing recent decisions of this Court addressing issues of state sovereign immunity, including *Alden* v. *Maine*, 527 U.S. 706 (1999), and *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the FMC concluded that

> [t]he doctrine of state sovereign immunity, even freed from the linguistic boundaries of the Eleventh Amendment, is meant to cover proceedings before judicial tribunals, whether Federal or state, not executive branch administrative agencies like the Commission. There is no compelling reason offered by either the ALJ or [respondent] to extend the reach of the Supreme Court's holdings in *Seminole Tribe* and *Alden*, and thereby nullify the Com-

> mission's jurisdiction over state ports, which jurisdiction has been in place for decades.

Pet. App. 33a.

The FMC also stated that "[a] private cause of action against an arm of the state brought before an administrative agency, because it invokes the remedial powers of the Executive branch, is in many respects more analogous to a Federal investigation than it is to a suit brought by a private party before a Federal or state court." Pet. App. 34a. It acknowledged that "[t]he Commission is also authorized to initiate investigations on its own motion," but asserted that "Commission investigations, and private complaint proceedings, are part of a unified system of regulation created by Congress under the Shipping Act." *Ibid.*

The FMC also briefly addressed the question whether any order it might issue at the conclusion of the case would be judicially enforceable in a suit brought by Maritime Services. The FMC expressed the view that the Eleventh Amendment would not bar such a suit because the action would be more analogous to a petition for review of an agency order than to a suit filed initially in the district court. Pet. App. 36a. The FMC also stated, however, that issuance of an order resolving the pertinent legal issues would be useful even if the order were ultimately held to be unenforceable, and that the ALJ therefore should not have dismissed the complaint based on the prediction that no enforceable order could result. *Id.* at 37a.

5. Pursuant to the Hobbs Administrative Orders Judicial Review Act, 28 U.S.C. 2341 *et seq.*, respondent filed a petition for review of the FMC's order in the United States Court of Appeals for the Fourth Circuit. The United States and the FMC filed separate briefs as

parties in the court of appeals. See 28 U.S.C. 2344, 2348.[2]

The court of appeals reversed the FMC's decision. Pet. App. 1a-25a. The court emphasized that while the Eleventh Amendment refers specifically to "[t]he Judicial power of the United States," this Court in *Alden* had applied principles of state sovereign immunity to suits brought in state courts. *Id.* at 7a-8a. The court of appeals concluded that "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states" is constitutionally impermissible "whether the forum be a state court, a federal court, or a federal administrative agency." *Id.* at 13a.

The court of appeals also rejected the contention made by the FMC and the United States that sovereign immunity does not apply because the administrative proceeding at issue here is not a "suit in law or equity" within the meaning of the Eleventh Amendment. The court stated that "[w]hether the proceeding is formally called an administrative action, a lawsuit, or an adjudication does not matter. The fundamental fact * * * is

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[2] The United States and the FMC both argued in the court of appeals that the adjudicative proceedings before the FMC were not precluded by principles of state sovereign immunity. The federal parties disagreed, however, with respect to the enforceability of any reparation order that the FMC might ultimately enter. The United States took the position that the Eleventh Amendment would bar any attempt to enforce an FMC reparation order through a suit filed by the private complainant. See U.S. C.A. Br. 26-27. The FMC, by contrast, argued that a private enforcement suit is analogous to a request for judicial review of an administrative order and as such would not be precluded by the State's sovereign immunity. FMC C.A. Br. 41-42.

Because the United States was a party to the proceedings in the court of appeals, it is a respondent in this Court. See Sup. Ct. R. 12.6.

that this proceeding requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state." Pet. App. 13a-14a. The court emphasized, in that regard, that under the FMC's regulations, the "investigation" that is triggered by the filing of a private complaint takes the form of an adjudication and is governed by rules very similar to those that apply to private lawsuits. *Id.* at 15a.

The court also rejected the contention that the FMC's lack of authority to enforce its own orders eliminated any Eleventh Amendment problem by giving a state defendant the practical ability to ignore the FMC proceedings. The court stated that even an unenforceable default judgment would stigmatize the state entity; that the FMC's order might have tangible adverse effects on the State in a subsequent proceeding; and that state officials cannot properly be expected to ignore the directive of a federal official. Pet. App. 17a-18a.[3]

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[3] Having concluded that the same principles of sovereign immunity that apply in court suits also apply in agency proceedings, the court determined that the administrative adjudication at issue in this case does not fall within any of the recognized exceptions to state sovereign immunity. See Pet. App. 19a-22a. Thus, the court explained that respondent had not consented to be sued, *id.* at 19a; that the complaint had not been brought by the United States or another State, *id.* at 19a-21a; that the proceeding was not one brought pursuant to Congress's enforcement authority under Section Five of the Fourteenth Amendment, *id.* at 21a; and that Maritime Services' claim had been brought against respondent itself rather than against state officers acting either in their official or individual capacities, *id.* at 21a-22a. Neither the United States nor the FMC had contested those points.

ARGUMENT

Although we submit that the court of appeals' decision is incorrect, review by this Court is not warranted. The Fourth Circuit is the first court of appeals to apply the principles set forth in *Alden* v. *Maine* to a case involving adjudicative proceedings before a federal administrative agency. Similar questions are presented by cases now pending before three other courts of appeals. The Fourth Circuit's ruling should have little practical significance for the enforcement of the Shipping Act. The petition for a writ of certiorari should therefore be denied.

1. a. The Eleventh Amendment by its terms limits the "Judicial power of the United States" to entertain certain types of "suit[s] in law or equity." U.S. Const. Amend. XI. Before *Alden*, the courts of appeals had uniformly held that States enjoy no immunity in administrative proceedings because administrative tribunals do not exercise the "Judicial power." See *Premo* v. *Martin*, 119 F.3d 764, 769 (9th Cir. 1997) (Eleventh Amendment "does not purport to affect proceedings in tribunals established by statute"), cert. denied, 522 U.S. 1147 (1998); *Tennessee Dep't of Human Services* v. *United States Dep't of Education*, 979 F.2d 1162, 1167 (6th Cir. 1992) ("[c]ourts have found no eleventh amendment bar to actions brought by federal administrative agencies pursuant to complaints of private individuals") (quoting *Ellis Fischel State Cancer Hosp.* v. *Marshall*, 629 F.2d 563, 567 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981)); *Ellis Fischel*, 629 F.2d at 567 ("The eleventh amendment bars *judicial* action, not action by Congress or the executive branch."); *Delaware Dep't of Health & Social Services* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (re-

jecting, in dictum, the contention that the Eleventh Amendment has "any possible application to proceedings before arbitrators"). Since this Court's decision in *Alden*, however, the court of appeals in this case and several district courts have concluded that constitutional principles of state sovereign immunity bar Executive Branch officials from adjudicating claims brought by private parties against unconsenting States.[4]

In *Alden*, this Court held that Congress may not require a State to submit to private suits for money damages brought in the State's own courts. The Court observed that "a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum," because "[a] power to press a State's own courts into federal service to coerce the other branches of the State * * * is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." *Alden*, 527 U.S. at 749. The Court also explained that the States possess an "immunity from suit," *id.* at 745, not merely an immunity from suit in federal court, and it concluded that a State may not be subjected "'to the coercive process of

[4] See *Connecticut Dep't of Environmental Protection* v. *Occupational Safety & Health Administration*, 138 F. Supp. 2d 285 (D. Conn. 2001); *Florida* v. *United States*, 133 F. Supp. 2d 1280 (N.D. Fla. 2001), appeal pending, No. 01-12380-HH (11th Cir.); *Ohio Environmental Protection Agency* v. *United States*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000), appeal pending, No. 01-3215 (6th Cir.); *Rhode Island Dep't of Environmental Management* v. *United States*, 115 F. Supp. 2d 269 (D.R.I. 2000), appeal pending, No. 01-1543 (1st Cir.).

judicial tribunals at the instance of private parties,' * * * regardless of the forum," *id.* at 749 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

Alden thus makes clear that a State's sovereign immunity from private suits is not limited to the federal courts. *Alden* does not, however, address the question whether constitutional immunity principles apply to proceedings that, while adjudicative in character, are conducted in an administrative rather than a judicial forum. And to the extent that *Alden* rested on the impropriety of commandeering a State's own courts (and, ultimately, state officials subject to the coercive power of those courts) over the State's objection, its reasoning is inapplicable to proceedings before a federal administrative agency lacking enforcement authority.

b. In their implementation of the Shipping Act, neither the FMC nor its ALJs exercise the "Judicial power" of the United States; the administrative forum is not a "judicial tribunal," 527 U.S. at 749; and the proceedings are not "private suits," *ibid.* Recognition of the non-judicial character of Executive Branch entities underlies the pre-*Alden* cases rejecting claims of immunity in administrative proceedings. In other contexts as well, courts have consistently recognized that an agency "adjudication" cannot be equated with a court proceeding.[5]

In decisions applying the "public rights" doctrine, for example, this Court has long recognized that admin-

[5] Cf. *Freytag* v. *Commissioner of Internal Revenue*, 501 U.S. 868, 909 (1991) (Scalia, J., concurring in part and concurring in the judgment) (explaining that federal agencies commonly "'adjudicate,' i.e., they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing 'inherently judicial' about 'adjudication.'").

istrative adjudication may share some features of a judicial proceeding without becoming judicial action. The public rights doctrine is grounded "in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently * * * judicial.'" *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). Application of the public rights doctrine involves examination of the law of the States and of England at the time of the framing of the Constitution to identify those disputes that can properly be resolved only by a tribunal wielding judicial power. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-285 (1856). The distinction between controversies that must be decided by courts and those that may properly be committed to the Executive Branch is thus as old as the Constitution itself.[6]

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[6] The public rights doctrine is not limited to disputes in which the government is a party. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 54 (1989) ("In our most recent discussion of the 'public rights' doctrine as it bears on Congress' power to commit adjudication of a statutory cause of action to a non-Article III tribunal, we rejected the view that a matter of public rights must at a minimum arise between the government and others.") (citations and internal quotation marks omitted). As this Court has explained, "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 593-594 (1985); see also *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833 (1986) (upholding power of the Commodity Futures Trading Commission to entertain state law counterclaims in reparation proceedings).

c. This Court has described the contempt power as an "inherent" power of all courts "necessary to the exercise of all others." *International Union* v. *Bagwell*, 512 U.S. 821, 831 (1994); see also *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 853 (1986) (concluding that agency was not wielding judicial power because, *inter alia*, the agency's orders were "enforceable only by order of the district court"). The Court in *Alden* focused on that aspect of the judicial power in ruling that a State may not be subjected "'to the coercive process of judicial tribunals at the instance of private parties,' * * * regardless of the forum." *Alden*, 527 U.S. at 749 (quoting *In re Ayers*, 123 U.S. at 505). Neither the FMC nor its delegees possess the contempt power, and their decisions can be enforced only in court and only insofar as enforcement is consistent with the Eleventh Amendment. See 46 U.S.C. app. 1713(c) and (d) (orders may be enforced in a district court "having jurisdiction over the parties"). Because the Eleventh Amendment would preclude a district court from exercising jurisdiction over a nonconsenting State in an enforcement action brought by a private party, the FMC's determination that a state entity has violated the Shipping Act cannot be used in furtherance of a private suit for monetary relief.[7]

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[7] The court of appeals' disposition of this case was based in part on its view that, notwithstanding the FMC's inability to enforce its own orders, state officials would "have an interest in avoiding the stigma that attaches even to an unenforceable default judgment," Pet. App. 17a, and might deem themselves legally obligated to comply with an FMC directive, see *id.* at 18a. But principles of sovereign immunity do not prevent the federal government from imposing legal obligations upon the States. See *Alden*, 527 U.S. at

Thus, the considerations that underlay the Court's decision in *Alden*—*i.e.*, the historical tradition of sovereign immunity from private lawsuits, the need to protect state treasuries from private incursions, and the impropriety of federal commandeering of state courts—are inapplicable here. The text of the Eleventh Amendment reflects the relevant historical distinction between exercises of the federal "Judicial power" and exercises of the Executive Branch's responsibility to investigate and enforce the laws. And the practical concern for the protection of the state fisc and the integrity of state institutions does not support extension of constitutional immunity to federal administrative proceedings conducted before an agency that lacks power to enforce its own orders.

d. For the foregoing reasons, constitutional principles of state sovereign immunity would not foreclose the FMC from issuing a reparation order against respondent. But even if such an order were precluded, the court of appeals' disposition of this case would be incorrect. Maritime Services' administrative complaint requested "an order compelling [respondent] to cease and desist from the * * * alleged violations" in addition to monetary relief for prior economic losses. Pet. App. 41a. If Maritime Services had filed suit in

754-755 ("The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the state a concomitant right to disregard the Constitution or valid federal law."). The Court in *Alden* did not, for example, question the authority of Congress to subject the States to the minimum-wage provisions of the Fair Labor Standards Act. Rather, principles of sovereign immunity restrict the manner in which those legal obligations may be enforced. Because the FMC lacks power to enforce its own orders, those orders are not "coercive" (*id.* at 749) in the relevant sense.

federal district court, the Eleventh Amendment would not have barred its request for a cease-and-desist order so long as individual state officers rather than the state agency itself had been named as defendants. Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), official-capacity suits arising under federal law and seeking prospective injunctive relief are permitted to go forward against state officers, notwithstanding the fact that such suits "generally represent only another way of pleading an action against the entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985).

Notwithstanding Maritime Services' request for prospective non-monetary relief, the court of appeals ordered that the administrative complaint be dismissed in its entirety. The court of appeals' disposition of the case necessarily reflects the view that the pleading requirements that apply to lawsuits against state entities apply, as well as the limits on substantive relief, with equal force in administrative adjudications. That view is misconceived. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the Court explained that "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity" because the Eleventh Amendment serves in part "to avoid 'the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties.'" *Id.* at 58 (quoting *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). Because the FMC is not a "judicial tribunal[]" and does not exercise "coercive process," that concern is inapplicable here. Thus, even if the court of appeals were correct in holding that principles of state sovereign immunity bar the FMC from issuing a reparation order against a

state entity, the court's order directing dismissal of the administrative complaint would be erroneous.

2. Although the decision below was incorrect, the petition for certiorari should be denied.

a. The petition states that "[t]he court of appeals' decision holds unconstitutional a provision of the 1984 [Shipping] Act." Pet. 9. That is incorrect. The court of appeals did not in terms declare any federal statutory provision to be unconstitutional; it held only that constitutional principles of state sovereign immunity preclude the FMC and its ALJs from adjudicating private complaints against unconsenting state entities. The court's determination that the FMC has implemented the Act in an unconstitutional manner does not amount to an invalidation of any provision of the Act itself. Cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 246-247 (1984) (explaining that in applying former 28 U.S.C. 1254(2), which authorized appeals from court of appeals decisions holding "'a State statute * * * to be invalid as repugnant to the Constitution,'" this Court "consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute."); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 63 (6th ed. 1986) ("a district court ruling that an administrative agency has interpreted and applied a statute in an unconstitutional manner does not amount to a judicial holding that the statute is unconstitutional 'as a whole' or 'as applied,' so as to be appealable under [former 28 U.S.C.] § 1252.").

Of course, if the court of appeals had understood the Shipping Act to *require* the FMC to conduct formal adjudicative proceedings whenever private complaints are filed against state entities, its holding that the

Constitution bars such proceedings would amount to a determination that an Act of Congress is unconstitutional. The evident premise of the petition for certiorari is that the Act imposes such a requirement. It is not clear, however, whether the court of appeals shared that view of the statute, or whether it regarded the FMC's willingness to adjudicate private complaints against state entities as the product of a discretionary agency policy choice. If the court of appeals interpreted the Shipping Act to grant the FMC discretion to determine whether to adjudicate private claims against state entities, the court's decision invalidating the FMC's chosen mode of enforcement would not amount to an invalidation of the statute itself—even if the court's construction of the Act is incorrect. We therefore do not believe that the court of appeals' decision is properly regarded as unambiguously declaring any federal statutory provision to be unconstitutional.[8]

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[8] This Court has observed that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974). If the FMC believed that the Shipping Act required it to commence formal adjudicative proceedings upon the filing of Maritime Services' complaint, it might naturally have been expected to refer to that statutory obligation, and to the principle articulated in *Johnson*, in its opinion rejecting respondent's Eleventh Amendment claim. In fact, however, the FMC's opinion (see Pet. App. 27a-38a) did not suggest that the Shipping Act requires it to conduct formal adjudicative proceedings when a private complaint is filed against a state entity. Rather, the thrust of the FMC's opinion was that private complaint proceedings are a useful means of enforcing the Shipping Act's substantive prohibitions, not that the statute itself vests private parties with the right to trigger the FMC's adjudicative machinery. See *id.* at 34a-35a. Given the absence of any assertion by the FMC in its opinion that the Shipping Act compelled it to

b. Since this Court's decision in *Alden*, the Fourth Circuit is the only court of appeals that has addressed the question whether principles of state sovereign immunity apply in proceedings before federal agencies. That issue is presented in cases now pending in other courts of appeals, in which States have challenged administrative proceedings initiated pursuant to the "whistleblower" provisions of various environmental statutes. See note 4, *supra*. This Court's review of the constitutional issue presented in this case would benefit from further consideration in additional statutory contexts by the courts of appeals.

c. The court of appeals' decision should have little practical effect on the FMC's enforcement of the Shipping Act. Even in cases where private parties allege Shipping Act violations committed by state entities within the Fourth Circuit, the court's decision would not preclude the FMC from adjudicating a request for a cease-and-desist order or comparable prospective relief, so long as the complaint names the responsible state officers rather than the state agency itself. See Pet. App. 21a-22a (court of appeals acknowledges that "in certain circumstances a private party may sue state officers in their official capacity to prevent ongoing violations of the law," but explains that "[t]his exception [to sovereign immunity] is irrelevant to the case at bar, as the private party brought its complaint for both legal and equitable relief against [respondent] itself."). Whether mandated by the Eleventh Amendment or not, that requirement should pose no practical impedi-

adjudicate Maritime Services' claim, the court of appeals may understandably have regarded the agency's willingness to do so as the product of a discretionary choice rather than of a statutory command.

ment to complainants' efforts to obtain non-monetary relief. And, while the court's decision will prevent the agency from adjudicating private reparation claims against state entities in the Fourth Circuit, any reparation orders that might result from such proceedings would not be enforceable in any event. The Shipping Act does not authorize any federal official to sue to enforce the FMC's awards of monetary relief, see 46 U.S.C. app. 1713 (Attorney General may file suit in federal district court to enforce FMC's nonreparation orders), and the Eleventh Amendment would preclude a private party from suing to enforce such an award.[9]

The petition for certiorari, moreover, identifies no evidence suggesting that private claims of Shipping Act violations committed by state entities have been filed with any frequency. (Nor has any finding been made that a violation occurred in this case.) And nothing in the court of appeals' decision prevents the FMC from continuing to adjudicate any private complaints that may be filed against state entities outside the Fourth Circuit—to the extent (if any) that such entities,

[9] The court of appeals expressed concern that if the FMC were permitted to issue a reparation order in a private complaint proceeding against a state entity, it might then attempt to induce payment by imposing civil penalties for non-compliance. Pet. App. 17a; see 46 U.S.C. app. 1712(a) (authorizing FMC to impose civil penalties for violations of its orders); 46 U.S.C. app. 1712(e) (authorizing Attorney General to file suit to enforce penalties). But while the FMC has taken the view that a reparation order against a state entity would be enforceable by means of a private suit, see Pet. App. 36a-37a, it has not suggested that a penalty proceeding against a State for non-compliance with a reparation order would be either a permissible or an appropriate exercise of administrative authority. Insofar as the court of appeals' decision precludes the FMC from pursuing that course of action, its ruling is therefore unlikely to have any meaningful practical effect.

engaging in activities subject to the Act, exist. Because the court of appeals has not unambiguously declared any federal statutory provision to be unconstitutional, the slight practical consequences of the court's decision weigh substantially against review by this Court at the present time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF THE FEDERAL MARITIME COMMISSION

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TABLE OF CONTENTS

	Page
I. The United States Fails to Acknowledge That the Court of Appeals' Holding That "Congress Cannot Authorize" Administrative Adjudications Involving State-run Ports Constitutes Invalidation of the Statute Requiring Such Proceedings	2
II. The Arguments of the South Carolina State Ports Authority Attempt to Divert Attention From the Significant Constitutional Issue Presented by This Case	6
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
Constitutional Provision	
U.S. Const. amend. XI	*passim*
Cases	
Alden v. Maine, 527 U.S. 706 (1999)	4
California v. United States, 320 U.S. 577 (1944)	8
Federal Maritime Comm'n v. Pacific Maritime Ass'n, 435 U.S. 40 (1978)	6
Florida v. United States, 133 F.Supp.2d 1280 (N.D. Fla. 2001)	3
In re New York, 256 U.S. 490 (1921)	8, 9
Plaquemines Port v. Federal Maritime Comm'n, 838 F.2d 536 (D.C. Cir. 1988)	8
Rhode Island v. United States, 115 F.Supp.2d 269 (D. R.I. 2000)	3
State of Ohio EPA v. United States, 121 F.Supp.2d 1155 (S.D. Ohio 2000)	3
United States v. Federal Maritime Comm'n, 694 F.2d 793 (D.C. Cir. 1982)	1
United States v. Locke, 529 U.S. 89 (2000)	9
Statute	
Shipping Act of 1984, Pub. L. 98-237, 98 Stat. 67, 46 U.S.C. app. 1701 *et seq.*:	
46 U.S.C. app. 1701(1-4)	1
46 U.S.C. app. 1702(6)	7
46 U.S.C. app. 1702(14)	8
46 U.S.C. app. 1710(b)	2
46 U.S.C. app. 1710(g)	2
46 U.S.C. app. 1713(d)	5
Miscellaneous	
Frank L. Maraist, *Admiralty* (West 1988)	8

REPLY BRIEF OF THE FEDERAL MARITIME COMMISSION

At issue in this case is the constitutionality of the private complaint procedure established by Congress in the Shipping Act of 1984. The 1984 Act has as its guiding purpose the creation of "a nondiscriminatory regulatory process" to develop "an efficient and economic transportation system" and to meet "national security needs." 46 U.S.C. app. 1701(1-4) (declaration of policy). As the agency responsible for administering the Act, the Federal Maritime Commission believes the issue whether port facilities run by states are immune from certain statutory processes is of great significance, and accordingly is asking this Court to review the Fourth Circuit's decision that the doctrine of state sovereign immunity applies to proceedings before the agency. *Amici curiae* the National Association of Waterfront Employers (an association of private marine terminal operators that compete with state-run ports), the United States Maritime Alliance (an association of vessel-operating common carriers, stevedores, and others), and the Carriers' Container Council (an association of United States and foreign vessel-operating common carriers), the voices of private industry in this case, agree that the court of appeals' decision is so deleterious to the maritime sector that it merits this Court's review. The South Carolina State Ports Authority (SCSPA), the beneficiary of the court of appeals' decision, naturally seeks to protect that decision by opposing the Commission's petition. The United States of America, the Commission's co-respondent before the court of appeals, agrees with the Commission that the decision below is wrong, but opposes review.[1] We turn first to the arguments of the United States.

[1] Disagreement between the Commission and the United States is not unusual. See, *e.g.*, *United States v. Federal Maritime Comm'n*, 694 F.2d 793, 804 (D.C. Cir. 1982) ("Congress was aware that the Justice Department on occasion had been and would be adversary of the [Commission] — both as a co-respondent and as a petitioner — and yet evinced no intent to preclude the Department from assuming that role").

I. The United States Fails to Acknowledge That the Court of Appeals' Holding That "Congress Cannot Authorize" Administrative Adjudications Involving State-run Ports Constitutes Invalidation of the Statute Requiring Such Proceedings

The United States maintains that "the decision below was incorrect," US Br. in Opp. 18, but contends that this Court should not review the court of appeals' erroneous ruling for three reasons. First, the United States suggests that the court of appeals did not "unambiguously" hold the private complaint provisions of the 1984 Act unconstitutional. *Id.* at 19. However, the United States also declares that

> if the court of appeals had understood the Shipping Act to *require* the FMC to conduct formal adjudicative proceedings whenever private complaints are filed against state entities, its holding that the Constitution bars such proceedings would amount to a determination that an Act of Congress is unconstitutional.

Id. at 18-19 (original emphasis). We submit that this is precisely what the court of appeals held. The court ruled that "[h]ere, a private party filed a complaint against an unconsenting State. The FMC had no choice but to adjudicate this dispute." Pet. App. 20a. The court of appeals also found that "the Commission *must* hear all complaints filed with it." Pet. App. 17a (original emphasis). See also 46 U.S.C. app. 1710(b) (the Commission "shall" adjudicate all filed complaints); 46 U.S.C. app. 1710(g) ("For any complaint filed within 3 years * * * the Commission shall * * * direct payment of reparations to the complainant for actual injury").

Contrary to the assertions of the United States, the court of appeals did not hold that "constitutional principles of state sovereign immunity preclude *the FMC and its ALJs* from adjudicating private complaints against unconsenting state entities." US Br. in Opp. 18 (emphasis supplied).

Rather, it ruled that "*Congress cannot authorize* private parties to haul unconsenting states before the adjudicative apparatus of federal agencies and commissions." Pet. App. 25a (emphasis supplied). It asked whether "the founders [would] have countenanced a system by which *Congress* could have avoided all the strictures of sovereign immunity by creating different tribunals where state sovereign immunity was completely inapplicable[.]" Pet. App. 12a-13a (emphasis supplied). It suggested that "dual sovereignty posits a relationship of mutual respect between Congress and the states," and found that "it is not consistent with that relationship for *Congress* to subject an unconsenting state to the coercive club of private actions regardless of the forum." Pet. App. 13a (emphasis supplied).

It is evident that the court of appeals held unconstitutional an Act of Congress, not the Commission's administration of that Act. If the court had thought that the Commission had implemented the 1984 Act in an impermissible way, it would have set forth such a conclusion as the basis of its decision, as the district courts have done in three of the four recent cases cited by the United States. US Br. in Opp. 12 n.4 (citing *State of Ohio EPA v. United States*, 121 F.Supp.2d 1155, 1168 (S.D. Ohio 2000) (issuing "a declaratory judgment that the regulations set forth in 29 C.F.R. Part 24 relating to claims made by individual complainants against the various States" violate the Eleventh Amendment); *Florida v. United States*, 133 F.Supp.2d 1280, 1291 (N.D. Fla. 2001) ("The administrative process here at issue * * * was adopted not by Congress in the statute but by the Secretary of Labor in the implementing regulations"); and *Rhode Island v. United States*, 115 F.Supp.2d 269, 271 (D. R.I. 2000) ("The regulations permit the employee to file a complaint with [OSHA], an agency within [the Dep't of Labor]")). Unlike these district court decisions, relied upon by the United States for its argument that the question presented by this case would be better presented in a later case, the court of

appeals in this proceeding clearly concluded that sections of an Act of Congress failed to pass constitutional muster.

Second, the United States observes that this case constitutes the first time a court of appeals has addressed the application of sovereign immunity to an administrative adjudication subsequent to this Court's decision in *Alden v. Maine*, 527 U.S. 706 (1999) (state sovereign immunity bars private suits to enforce a federal statute in state court). Significantly, the United States asserts that *Alden*'s reasoning, to the extent it "rested on the impropriety of commandeering a State's own courts * * * over the State's objection," is inapplicable to this case, and further avers that *Alden* does not "address the question whether constitutional immunity principles apply to proceedings that * * * are conducted in an administrative rather than judicial forum." US Br. in Opp. 13. Nevertheless, the United States suggests that "the constitutional issue presented in this case would benefit from further consideration in additional statutory contexts" in cases "now pending in other courts of appeals." *Id.* at 20. However, as noted above, the district courts in those pending cases appear to have addressed the constitutionality of the regulations rather than the underlying statutes. Moreover, none of the pending cases cited by the United States involves maritime commerce. *Id.* at 12 n.4 (cited cases involve "whistle blower" laws). One crucial premise of the Commission's petition is that maritime commerce merits special consideration given its significance in the genesis of the Constitution. Pet. 16-18. Cases that do not involve maritime commerce will not present the Court with the maritime component of the issue central to this proceeding.

Finally, the United States asserts that there would be little practical effect if the court of appeals' decision is permitted to stand. US Br. in Opp. 20-22. It is important to understand the basis for this view. The United States argues that a proceeding to enforce a Commission-issued reparations award (one form of relief sought in Maritime Services' complaint against SCSPA) would be forbidden, although the

1984 Act specifically provides for such an enforcement proceeding. *Id.* at 21. See 46 U.S.C. app. 1713(d) (enforcement of reparations awards). No court has ever ruled that an enforcement proceeding under the 1984 Act is forbidden; the Commission itself stated that such a proceeding would not be barred because it constitutes a form of judicial review, not a lawsuit. Pet. App. 36a-37a. Thus, the United States' dismissive approach to this case is premised on its unique interpretation of the 1984 Act, an interpretation that holds invalid a provision of the Act no court has ever found constitutionally infirm. In contrast, the Commission and the *amici curiae* believe the precedent established by the court of appeals' decision will have significant negative consequences for the maritime industry. Indeed, the United States' declaration that there is "no evidence that private claims of Shipping Act violations committed by state entities have been filed with any frequency," US Br. in Opp. 21, is repudiated by the cases cited in the *amici curiae* brief of USMX and CCC. See USMX and CCC Am. Br. 7 n.4.[2]

The United States' conclusion that the court of appeals' decision will have little effect on the maritime industry and the Commission's regulation of that industry is both perfunctory and erroneous. In contrast, the United States offers serious and reasoned arguments in support of its assertion that the court of appeals' decision is incorrect. See US Br. in Opp. 11-18. The United States agrees with the Commission's position that an administrative adjudication is not a "suit in law or equity," is not an exercise of judicial power, and therefore is not

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[2] The practical effect on Maritime Services' complaint will be great. Although the court of appeals opined that a complainant could seek a cease and desist order so long as it names a state official in its complaint, Pet. App. 21a–22a, the court did not remand this proceeding to the Commission to permit Maritime Services to amend its complaint in this manner. Rather, it ordered the entire complaint dismissed. Pet. App. 25a. The United States agrees that complaints naming a state official and seeking prospective relief should be permitted, but does not address the court's dismissal of the entirety of Maritime Services' complaint. US Br. in Opp. 20.

subject to the Eleventh Amendment and the doctrine of state sovereign immunity from suit. *Ibid.* These areas of agreement form much of the foundation of the Commission's petition for a writ of certiorari.

II. The Arguments of the South Carolina State Ports Authority Attempt to Divert Attention From the Significant Constitutional Issue Presented by This Case

The Commission will address each of SCSPA's six main arguments in turn. First, SCSPA asserts that this Court should deny the writ because the court of appeals "faithfully followed this Court's precedent." SCSPA Br. in Opp. 11. However, as there is no Supreme Court precedent addressing the issue whether state sovereign immunity from suit applies to an administrative adjudication, the court of appeals was not able to follow direct precedent. Rather, the court analogized to cases that addressed the scope of sovereign immunity before federal and state courts. Pet. App. 4a-9a. Whether this analogy is correct is precisely the issue in this proceeding.

Next, SCSPA argues that the Court should deny the writ because this case does not fall within the Commission's jurisdiction. SCSPA Br. in Opp. 12. SCSPA's present argument that the Court should deny the petition because the Commission has "failed to consider whether the Johnson Act forecloses its jurisdiction over this case" is disingenuous. SCSPA Br. in Opp. 13. Although raised in SCSPA's original motion to dismiss the complaint, the issue of the relationship between South Carolina's gambling statutes and the John[illegible] Act was not addressed by the administrative law judge. Pet. App. 49a.[3] In its order overruling the administrative law

[3] SCSPA's claim that the Johnson Act must trump the 1984 Act is mistaken. See, *e.g.*, *Federal Maritime Comm'n v. Pacific Maritime Ass'n*, 435 U.S. 40, 52-60 (1978) (lawfulness under the National Labor Relations Act does not preclude unlawfulness under the Shipping Act, 1916.

judge with respect to state sovereign immunity, the Commission remanded the proceeding for consideration of SCSPA's arguments regarding the Johnson Act. Pet. App. 37a. SCSPA both appealed the Commission's order to the court of appeals and filed a motion asking the administrative law judge to hold the remanded proceeding in abeyance pending the outcome of the court of appeals' review; SCSPA's motion was granted.[4] SCSPA did not raise the Johnson Act issue before the court of appeals.[5]

SCSPA also suggests that because this case does not involve "the common carriage of goods," it does not pertain to oceanborne commerce and is not subject to the Commission's jurisdiction. SCSPA Br. in Opp. 13. This is inaccurate, because the 1984 Act confers jurisdiction over "transportation by water of *passengers* or cargo between the United States and a foreign country for compensation." 46 U.S.C. app. 1702(6) (emphasis supplied). In its complaint, Maritime Services alleged that it intended to offer passenger cruises to nowhere and passenger cruises to the Bahamas, a foreign country, for compensation. See Pet. App. 40a.

Third, SCSPA attempts to insert the scope of the United States' sovereign immunity into this proceeding by referring to arguments made by the United States, in a different forum and under a different statute, that it is immune from some types of administrative action. SCSPA Br. in Opp. 14-16. The degree of the United States' immunity from proceedings in its own fora is irrelevant; the scope of SCSPA's immunity is

[4] The Commission has lodged with the Clerk of this Court ten copies of the administrative law judge's May 10, 2000 order granting SCSPA's request to hold the remanded proceeding in abeyance.

[5] In any event, the precedent established by the court of appeals' decision does not apply exclusively to cases involving cruise ships on which gambling may be offered. Rather, the decision states that Congress may not authorize federal administrative agencies to adjudicate complaints filed against state entities, irrespective of the subject matter of the authorizing statute. Pet. App. 25a.

the only issue in this case. SCSPA's suggestion that the wholly geographic definition of the term "United States" in the 1984 Act is germane to this proceeding is similarly misplaced. *Id.* at 15. It is the definition of "person," not "United States," that determines whether a port like SCSPA is subject to private complaints filed under the Act. See 46 U.S.C. app. 1702(14), Pet. App. 63a. This Court has already determined that a state-run port such as SCSPA is a "person." *California v. United States*, 320 U.S. 577 (1944). See also *Plaquemines Port v. Federal Maritime Comm'n*, 838 F.2d 536, 542 (D.C. Cir. 1988) ("prior interpretations of the 1916 Act's provisions have continuing precedential force" under the 1984 Act).

Fourth, in spite of its own recognition that "the issue of Congressional intent to abrogate * * * is not at issue here," SCSPA argues that because no provision in the 1984 Act purports to abrogate sovereign immunity, the court of appeals could not have held any portion of the Act unconstitutional. SCSPA Br. in Opp. 22, 16-18. The issue of abrogation has never been relevant to this proceeding, as the court of appeals recognized. Pet. App. 21a. See US Br. in Opp. 10 n.3 ("Neither the United States nor the FMC had contested" whether the 1984 Act abrogates state immunity under the Fourteenth Amendment). See also *supra* at 2-4 (explaining that the court of appeals held an Act of Congress unconstitutional).

Fifth, SCSPA asserts that the federal interest in the uniform regulation of maritime commerce is not sufficient to override the immunity SCSPA claims it should enjoy. SCSPA Br. in Opp. 18-20. However, the case SCSPA cites for this proposition, *In re New York*, 256 U.S. 490 (1921), is an *admiralty* case. Federal judicial jurisdiction over a common law admiralty claim is not fungible with Congress' Article I power over international maritime commerce or Executive Branch authority to regulate such commerce. See, *e.g.*, Frank L. Maraist, *Admiralty* 1 (West 1988) (admiralty "denotes those rules which govern contract, tort and

worker's compensation claims arising out of commerce on or over water"). See also *United States v. Locke*, 529 U.S. 89, 99 (2000) (explaining that exclusive federal control over maritime commerce was one of the reasons the Founders gave for adopting the Constitution). The court of appeals apparently shared this understanding: SCSPA cited *In re New York* in its reply brief, but the court did not rely on that case in its decision.

Finally, SCSPA contends that the court of appeals' decision did not create a conflict in principle among the circuits. SCSPA Br. in Opp. 21-29. Relying upon the same four federal district court opinions cited by the United States (without noting that the United States has appealed three of the four cases (US Br. in Opp. 12 n.4)), SCSPA extrapolates from these four opinions a "universal understanding among the lower federal courts" regarding the application of sovereign immunity to administrative tribunals. *Id.* at 21. The Commission demonstrated above that these district court cases, which address the regulations implementing several "whistleblower" statutes, do not apply to the question presented by this proceeding. See *supra* at 3-4.

The remainder of SCSPA's arguments regarding the conflict in principle appear to misapprehend the Commission's position. In the cases cited by the Commission, several federal courts of appeals refused to apply the Eleventh Amendment to proceedings before federal administrative tribunals. Pet. 18-21. Although many of the opinions also addressed concepts like waiver or abrogation of immunity, these concepts do not form the bases for the courts' holdings. Rather, the opinions share the fundamental conclusion that the Eleventh Amendment does not apply to entities (like the Commission) that do not exercise judicial power. This is the conflict in principle the Commission has sought to illustrate. See US Br. in Opp. 11-12 (accord with the Commission's description of the relevant cases).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,

Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR UNITED STATES MARITIME ALLIANCE LIMITED AND CARRIERS CONTAINER COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Introduction

In 1994, Respondent South Carolina State Ports Authority ("SCSPA") petitioned the Federal Maritime Commission ("FMC"), the petitioner herein, for approval of certain amendments SCSPA proposed to include in its FMC-filed terminal tariff, which prescribes the terms and conditions SCSPA imposes on customers and contractors utilizing its marine terminal facilities in the Port of Charleston. *See Petition of South Carolina State Ports Auth. For Declaratory Order*, Docket No. 94-24, Final Decision (FMC Aug. 12, 1997), *available at http://www.fmc.gov/dockets/94-24.ord.* SCSPA's proposed tariff amendments included guidelines for the licensing by SCSPA of stevedores and marine terminal operators allowed to use SCSPA's facilities and for reserving to SCSPA itself certain terminal functions at the facility, thus denying competitors access to its publicly-owned facilities to perform these functions. Carriers Container Council, Inc., ("CCC"), which now seeks leave to file the attached *amici curiae* brief, was permitted by the FMC to intervene in opposition to SCSPA's tariff amendments to protect CCC's carrier-members' right to use the services of stevedores and marine terminal operators of their own choosing. CCC also protested the tariff amendment requiring applicants for stevedore licenses to promote commerce through Charleston because it would unjustly discriminate against multi-port stevedores in violation of federal shipping law.

Just last year CCC and United States Maritime Alliance Limited ("USMX"), the two movants for permission to file the attached brief as *amici curiae*, contemplated the filing of a complaint with the FMC against SCSPA for imposing restrictions at its facility that prohibited CCC's and USMX's carrier-members from utilizing a gate at SCSPA's Charleston

terminal that was operated by a marine terminal company that competed with SCSPA. SCSPA staffs its gate with state employees; the competing terminal operator uses longshore workers represented by the International Longshoremen's Association, AFL-CIO ("ILA"). SCSPA's restriction prevented CCC's and USMX's carrier-members from complying with the obligation in their collective bargaining agreement with the ILA that requires them to use longshore workers represented by the ILA.

USMX and CCC hereby move, pursuant to SUP. CT. R. 37.2(b), for leave to file the attached brief *amici curiae* to join petitioner in seeking this Court's review of a decision that threatens to deprive USMX and CCC of avenues of relief they have resorted to in the past to vindicate their members' federal shipping law rights against state port authorities. Petitioner Federal Maritime Commission has consented to the filing of this *amici curiae* brief. Its written consent has been lodged with the Clerk of the Court. Respondent SCSPA has refused to consent.

Movants: Their Identities, Purposes, and Functions

USMX and CCC are non-profit membership associations which are the principal management, multiemployer collective bargaining representatives for employers of longshore workers on the Atlantic and Gulf Coasts of the United States. USMX is an association of ocean carriers, port associations, marine terminal operators, and stevedoring companies. USMX's members handle virtually all of the general cargo shipped through United States ports on the East and Gulf Coasts. CCC is an association of the major United States and foreign ocean carriers serving United States ports in connection with the transportation of goods by sea in international trade and commerce. CCC's 25 carrier-members during the past calendar year transported to and from United States Atlantic and Gulf ports more than 50 million tons of containerized cargo in the foreign trades of the Untied States. This cargo volume amounts to approximately three-fourths of all containerized cargo loaded and unloaded at United States Atlantic and Gulf ports.

The principal mission of USMX and CCC is to represent their members in collective bargaining with the ILA — the labor organization that represents dockworkers employed on the Atlantic and Gulf Coasts. USMX is the lead negotiator in Master Contract negotiations with the ILA covering ports from Maine to Texas; CCC is primarily responsible for Master Contract administration. This Master Contract establishes the terms and conditions of employment for tens of thousands of American longshore workers on the Nation's Eastern and Southern shores.

USMX and CCC also represent their members' interests in regulatory matters that affect their business and labor practices. The carrier members of these associations are the customers of Respondent SCSPA and other state port authorities operating marine terminals in United States ports. The stevedoring- and marine-terminal-members of USMX are the competitors and contractors of these state authorities. In the past, federal shipping law has provided CCC, USMX, and their members with the means to challenge actions taken by these state port authorities that interfered with the commercial interests of the members of CCC and USMX or impeded the administration of their collective bargaining agreements with the ILA. *See supra* pp. 1-2.

Movants' Interest In This Case

The extension by the court of appeals in this case of the doctrine of state sovereign immunity to proceedings before federal administrative agencies is a crucial issue of constitutional law that affects the interests of CCC, USMX, and their members. If the decision of the court of appeals in this case is allowed to stand, the members of USMX, CCC, and other bargaining and trade associations in the maritime industry will be deprived of

the rights provided by Congress to obtain recourse for shipping law violations committed by state commercial instrumentalities operating marine terminals that are essential for the conduct of the members' transportation businesses. These shipping law violations may not only affect the members' commercial interests but also may have a significant impact upon their collective bargaining interests. Indeed, over the years the FMC has decided shipping law cases that have had a direct and immediate impact on collective bargaining in the maritime and longshore industries. *See, e.g., Volkswagenwerk AG v. FMC*, 390 U.S. 261 (1968); *New York Shipping Ass'n v. FMC*, 854 F.2d 1338 (D.C. Cir. 1988), *cert. denied*, 488 US. 1041 (1989); *Boston Shipping Ass'n v. FMC*, 706 F.2d 1231 (1st Cir. 1983).

USMX's and CCC's brief *amici curiae* will present the views of customers, competitors, and contractors of state-operated marine terminals and provide the perspective of private enterprise in a case that centers upon an intergovernmental controversy. Because of the singular importance of the constitutional issue presented, the vital and compelling interests of CCC, USMX, and their members in the resolution of that issue, and the particular perspective they provide, CCC and USMX request leave to file the attached brief as *amici curiae* in this case.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Introduction	1
Interest of the *Amici Curiae*	2
Summary of Argument	3
Argument	4
Review On Writ Of Certiorari Is Warranted Because This Case Involves A Novel Constitutional Question Of National Importance That Has A Direct And Substantial Impact On The Federal Regulatory Regime	4
A. Constitutional Question Of First Impression	5
B. Nationwide Effect Of Decision Below Upon Federal Regulatory System	6
C. Decision Below Contravenes The Constitutional Plan	10
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

United States Constitution:

art. I, § 8, cl. 3 11

art. I, § 8, cl. 10 11

art. I, § 9, cl. 5 11

art. I, § 9, cl. 6 11

art. I, § 10, cl. 2 11-12

art. I, § 10, cl. 3 11-12

U.S. CONST. amend. XI 4n, 5

Cases:

Alden v Maine, 527 U.S. 706 (1999) 5, 10

Bethlehem Steel Corp. v. Indiana Port Comm'n, 21 F.M.C. 629 (1979) 7n

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 12

California v. United States, 320 U.S. 577 (1944) 7

Ceres Marine Terminal, Inc. v. Maryland Port Admin., 27 Shipping Reg. Rep. (P&F) 1251 (FMC 1997), *remanded*, 1998 U.S. App. LEXIS 25733 (4th Cir. 1998) 7n

Cited Authorities

Page

Clark v. Barnard, 108 U.S. 436 (1883) 5

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 5, 11

Connecticut Dep't of Environmental Protection v. OSHA, 138 F. Supp. 2d 285 (D. Conn. 2001) ... 9n

Elhaj-Chehade v. University of Texas, 1999 OCAHO LEXIS 3 (Jan. 28, 1999) 9n

Florida v. United States, 133 F. Supp. 2d 1280 (N.D. Fla. 2001) 9n

Hans v. Louisiana, 134 U.S. 1 (1890) 5

Harrington & Co. v. Georgia Ports Auth., 23 Shipping Reg. Rep. (P&F) 753 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 1276 (FMC 1986) 7n

Hensel v. Office of Chief Administrative Hearing Officer, 38 F.3d 505 (10th Cir. 1994) 9

James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist., 27 Shipping Reg. Rep. (P&F) 1123 (FMC 1997) 7n

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 5

Page

Kupferberg v. University of Oklahoma Health Sciences Center, 1994 OCAHO LEXIS 99 (Nov. 21, 1994) 9n

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 10

Ohio Environmental Protection Agency v. United States Dept. of Labor, 121 F. Supp. 2d 1155 (S.D. Ohio 2000) 9n

Palmetto Shipping & Stevedoring Co. v. Georgia Ports Auth., 24 Shipping Reg. Rep. (P&F) 50 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 761 (FMC 1988) 7n

Pate Stevedore Co. of Mobile v. Alabama State Docks Dep't, 24 Shipping Reg. Rep. (P&F) 657 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 1221 (FMC 1989) 7n

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Ryan Walsh, Inc. v. Port of Houston Auth., No. 97-16, Approval of Settlement (FMC ALJ Apr. 30, 1998), *available at http://www.fmc.gov/dockets/97-16ABC.htm* 7n

Page

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 4, 5

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Southeastern Mar. Co. v. Georgia Ports Auth., 23 Shipping Reg. Rep. (P&F) 530 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 941 (FMC 1986) 7n

Stevens Shipping & Terminal Co. v. South Carolina State Ports Auth., 23 Shipping Reg. Rep. (P&F) 267 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 684 (FMC 1985) 7n

United States Lines v. Maryland Port Admin., 23 F.M.C. 441 (1980) 7n

United States v. Locke, 529 U.S. 89 (2000) 12

United States v. Texas, 143 U.S. 621 (1892) 10n

Wong-Opasi v. Tennessee, 2000 OCAHO LEXIS 2 (Jan. 11, 2000) 9n

Cited Authorities

	Page
Statutes:	
8 U.S.C.A. § 1324a (West 1999 & Supp 2001) ...	9
15 U.S.C.A. § 2622 (West 1998)	9n
33 U.S.C.A. § 1367 (West 1986)	9n
42 U.S.C.A. § 300j - 9(i) (West Supp. 2000)	9n
42 U.S.C.A. § 5851 (West 1995)	9n
42 U.S.C.A. § 6971 (West 1995)	9n
42 U.S.C.A. § 7622 (West 1995)	9n
42 U.S.C.A. § 9610 (West 1995)	9n
Rules:	
SUP. CT. R. 37.6	1n

BRIEF FOR UNITED STATES MARITIME ALLIANCE LIMITED AND CARRIERS CONTAINER COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTION[1]

The United States Court of Appeals for the Fourth Circuit has ruled that State sovereign immunity trumps Congress's power to authorize private litigants to obtain redress against State commercial instrumentalities before federal administrative agencies for the instrumentalities' violation of federal law. This decision involves a novel question of constitutional law never before addressed by this Court. The Fourth Circuit's resolution of this issue, if left undisturbed, will upset longstanding congressional regimes not only in the maritime industry but also in other sectors of the national economy that have historically subjected state commercial activities to the same federal regulation applicable to private enterprises.

The court of appeals in this case has unleashed the doctrine of State sovereign immunity from its Article III moorings and allowed it to wander into Article I waters, where it threatens to deprive private enterprises of recourse before federal administrative agencies to remedy violations of federal law committed by state commercial instrumentalities. Review of this case will enable the Court to cabin the scope of State sovereign immunity to promote a federalism that binds the States to the supremacy of federal regulation of objects committed by the Constitution to exclusive federal sovereignty.

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1. In accordance with SUP. CT. R. 37.6, this is to confirm that no part of this brief was authored by counsel for any party and that only the *amici curiae* contributed monetarily to the preparation and submission of this brief.

INTEREST OF THE *AMICI CURIAE*

United States Maritime Alliance Limited ("USMX") and Carriers Container Council, Inc. ("CCC") are non-profit membership associations which are the principal management, multiemployer collective bargaining representatives for employers of longshore workers on the Atlantic and Gulf Coasts of the United States.

USMX is an association of ocean carriers, port associations, marine terminal operators, and stevedoring companies. USMX's members handle virtually all of the general cargo shipped through United States ports on the East and Gulf Coasts. CCC is an association of the major United States and foreign ocean carriers serving United States ports in connection with the transportation of goods by sea in international trade and commerce. CCC's 25 members during the past calendar year transported to and from United States Atlantic and Gulf ports more than 50 million tons of containerized cargo in the foreign trades of the Untied States. This cargo volume amounts to approximately three-fourths of all containerized cargo loaded and unloaded at United States Atlantic and Gulf ports.

The principal mission of USMX and CCC is to represent their members in collective bargaining with the International Longshoremen's Association, AFL-CIO ("ILA") — the labor organization that represents dockworkers employed on the Atlantic and Gulf Coasts. USMX is the lead negotiator in Master Contract negotiations with the ILA covering ports from Maine to Texas; CCC is primarily responsible for Master Contract administration. This Master Contract establishes the terms and conditions of employment for tens of thousands of American longshore workers on the Nation's Eastern and Southern shores.

USMX and CCC also represent their members' interests in regulatory matters. The carrier members of these associations are the customers of Respondent South Carolina State Ports Authority ("SCSPA") and other state port authorities operating marine terminals in United States ports. The stevedoring- and marine-terminal-members of USMX are the competitors and contractors of these state authorities. In the past, federal shipping law has provided CCC, USMX, and their members with the means to challenge actions taken by these state port authorities that interfered with the commercial interests of the members of CCC and USMX or impeded the administration of their collective bargaining agreements with the ILA. Should the decision of the court of appeals in this case be permitted to stand, the members of USMX and CCC would be deprived of these remedies that Congress has provided. The *amici* joining in this brief, therefore, have a vital and compelling interest in convincing this Court to entertain review of this case to define the appropriate parameters of State sovereign immunity.

SUMMARY OF ARGUMENT

Review by writ of certiorari is warranted because the rule of decision of the court of appeals involves a question of constitutional law never before addressed by this Court. The decision of the court of appeals, if left undisturbed, places in jeopardy the continuing vitality of private complaint proceedings before administrative agencies to redress violations of federal law by state commercial instrumentalities. The principal of constitutional law adopted by the court of appeals is already hindering the enforcement not only of federal shipping laws but also of the whistleblower provisions of federal environmental statutes and the employment discrimination prohibitions of federal immigration statutes.

Issuance of a writ of certiorari will enable this Court to limit the reach of the doctrine of State sovereign immunity by holding that state instrumentalities engaged in commercial activities, like maritime commerce, that fall within the objects committed by the plan of the Constitution to the exclusive sovereignty of the Federal Government are subject to regulation under applicable federal law by duly constituted federal regulatory agencies which may require those state commercial entities to defend complaints filed by private persons in administrative proceedings before the agencies. This refinement of the doctrine of State sovereign immunity will promote a federalism that binds the States to the sovereignty they granted to the Federal Government when they ratified the Constitution.

ARGUMENT

Review On Writ Of Certiorari Is Warranted Because This Case Involves A Novel Constitutional Question Of National Importance That Has A Direct And Substantial Impact On The Federal Regulatory Regime

At the close of the Twentieth Century this Court issued a series of decisions that fortified the protections afforded to the States by the Eleventh Amendment and the doctrine of sovereign immunity.[2] In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996), the Court ruled that the principle of state sovereign immunity embodied in the

2. The Eleventh Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

Eleventh Amendment prevents congressional authorization in federal enactments of suits by private parties in the federal courts against unconsenting States. *Seminole Tribe* awakened the echoes of *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), which had observed that each State is a sovereign in the federal system and that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States."

In *Alden v Maine*, 527 U.S. 706 (1999), this Court held that the sovereign immunity of the States extends to private suits to enforce federal statutory rights in state courts. In the view of the *Alden* Court, the sovereign immunity of the States derives not from the literal language of the Eleventh Amendment, which "confirmed rather than established sovereign immunity as a constitutional principle," but from the structure of the original Constitution itself. 527 U.S. at 728-29.

While a State may waive its sovereign immunity by consenting to suit, *see Clark v. Barnard*, 108 U.S. 436, 447-48 (1883), this Court in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 679-87 (1999), held that a State's proprietary activities in a traditionally for-profit enterprise does not constitute a constructive waiver of its sovereign immunity from an Article III lawsuit.

A. Constitutional Question Of First Impression

The decisions of this Court have confined the doctrine of sovereign immunity to assertions of judicial power against the States. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 98 (2000) (Stevens, J. dissenting) ("*Seminole Tribe* . . . leaves open a State's liability upon enforcement of federal law by federal agencies."). The court of appeals in this case went

where this Court had never gone before. The court below ruled that States were immune from the exercise of federal Executive Power by an administrative agency established by Congress through the exercise of its Article I powers. It held that a State's sovereign immunity protects it from being brought before a federal administrative agency by a private party (Pet. App. 2a).[3] In the view of the court of appeals, the doctrine of sovereign immunity deprives Congress of the authority to permit private parties to hale unconsenting States into any adversarial proceeding, including those within the adjudicative apparatus of federal agencies and commissions (Pet. App. 12a, 25a).

B. Nationwide Effect Of Decision Below Upon Federal Regulatory System

The importance of the constitutional question presented in this case is self-evident. Apart from the fact that the issue is one of first impression never before addressed by the Supreme Court, its resolution by the court of appeals places in jeopardy the continued vitality of enforcement mechanisms that form the backbone of the federal regulatory system. Many federal enactments contain administrative procedures that enable private litigants to commence complaint proceedings before federal agencies to obtain redress for violations of the substantive provisions of these federal statutes. Private litigants are the agencies' eyes and ears. These private parties bring to the agencies' attention possible infringements of federal law that would otherwise go undetected if enforcement were to depend solely upon the limited resources of the agencies themselves. Indeed, in its decision in this case, Petitioner Federal Maritime Commission ("FMC") explained that its "jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports." (Pet. App. 33a).

3. The abbreviation "Pet. App." refers to the separately bound appendix that accompanied the petition for certiorari filed in this case.

Private complaint proceedings against States involved in activities subject to federal regulation have been a staple of administrative law. This is particularly true before Petitioner FMC. Almost a half century ago this Court held that state instrumentalities by virtue of their operation of marine terminal facilities are "persons" subject to regulation under federal shipping statutes. *See California v. United States*, 320 U.S. 577, 585-86 (1944). Indeed, over the years Respondent SCSPA and its counterparts in other ports have been brought before the FMC in complaint proceedings commenced by private parties to redress alleged shipping law violations by these state instrumentalities.[4] At no time prior to this case was there ever any question raised that this type of administrative proceeding was an impermissible infringement of the instrumentalities' sovereign immunity.

4. *See Ryan Walsh, Inc. v. Port of Houston Auth.*, No. 97-16, Approval of Settlement (FMC ALJ Apr. 30, 1998), *available at http://www.fmc.gov/dockets/97-16ABC.htm*; *Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 27 Shipping Reg. Rep. (P&F) 1251 (FMC 1997), *remanded*, 1998 U.S. App. LEXIS 25733 (4th Cir. 1998); *James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 27 Shipping Reg. Rep. (P&F) 1123 (FMC 1997); *Pate Stevedore Co. of Mobile v. Alabama State Docks Dep't*, 24 Shipping Reg. Rep. (P&F) 657 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 1221 (FMC 1989); *Palmetto Shipping & Stevedoring Co. v. Georgia Ports Auth.*, 24 Shipping Reg. Rep. (P&F) 50 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 761 (FMC 1988); *Harrington & Co. v. Georgia Ports Auth.*, 23 Shipping Reg. Rep. (P&F) 753 (I.D.), *adopted* , 23 Shipping Reg. Rep. (P&F) 1276 (FMC 1986); *Southeastern Mar. Co. v. Georgia Ports Auth.*, 23 Shipping Reg. Rep. (P&F) 530 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 941 (FMC 1986); *Stevens Shipping & Terminal Co. v. South Carolina State Ports Auth.*, 23 Shipping Reg. Rep. (P&F) 267 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 684 (FMC 1985); *South Carolina State Ports Auth. v. Georgia Ports Auth.*, 22 Shipping Reg. Rep. (P&F) 1111 (FMC 1984); *United States Lines v. Maryland Port Admin.*, 23 F.M.C. 441 (1980); *Bethlehem Steel Corp. v. Indiana Port Comm'n*, 21 F.M.C. 629 (1979).

It has always been a fact of life in the shipping industry that state port authorities engaged in the business of marine terminal operations subject to the shipping laws of the United States must defend complaint proceedings brought against them before the FMC. Indeed, for the first 37 years of SCSPA's existence, from its formation in 1962 until 1999, there was never any doubt voiced by SCSPA as to this regulatory obligation. In 1999, however, the SCSPA amended the terminal tariff it files with the FMC governing the terms and conditions SCSPA sets for use of the marine terminals it operates in South Carolina to include an express choice of forum clause. The amendment provides that every person utilizing SCSPA's marine terminals consents to the jurisdiction of the South Carolina state courts in any actions against the SCSPA arising from the terminal services the Authority furnishes except for "actions brought pursuant to Acts of the Congress of the United States that expressly designate the jurisdiction in which such actions should be brought and from which the Authority would not have sovereign or eleventh amendment immunity." SCSPA's Terminal Tariff No. FMC-T No. 8, Rule 34-021 (effective Jan. 6, 1999), *available at http://www.port-of-charleston.com*. While the tariff amendment contains an implicit recognition that SCSPA is answerable in those tribunals designated by Congress, which in the case of state-operated marine terminals, like SCSPA, undoubtedly means the Federal Maritime Commission, the amendment for the first time in SCSPA's history invokes the concept of sovereign or eleventh amendment immunity as a possible impediment to the exercise of jurisdiction by that congressionally designated tribunal.

The intrusion of the doctrine of sovereign immunity into the federal regulatory regime is hindering the enforcement of other federal statutes besides the shipping acts. The enforcement of "whistleblower" provisions enacted by

Congress in federal environmental statutes has been affected.[5] Within the last year and a half, four federal district courts, including one that relied heavily on the decision of the court of appeals in this case, invoked the sovereign immunity doctrine to bar federal administrative proceedings commenced by whistleblowers seeking recourse for retaliatory or discriminatory actions taken against them by their state employers.[6] Administrative proceedings before the Executive Office For Immigration Review by employees seeking recourse under the Immigration Reform and Control Act, 8 U.S.C.A. § 1324a (West 1999 & Supp 2001), for citizenship-based employment discrimination by State instrumentalities have been outlawed by the United States Court of Appeals for the Tenth Circuit in a decision in which the court of appeals simply assumed without discussion that the administrative proceeding qualified as a lawsuit for sovereign immunity purposes. *See Hensel v. Office of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994). The Tenth Circuit's ruling has shut the door of the Executive Office For Immigration Review to victims of citizenship-based employment discrimination by state employers.[7]

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5. 15 U.S.C.A. § 2622 (West 1998) (Toxic Substance Control Act); 33 U.S.C.A. § 1367 (West 1986) (Water Pollution Prevention & Control Act); 42 U.S.C.A. § 300j - 9(i) (West Supp. 2000) (Safe Drinking Water Act); 42 U.S.C.A. § 5851 (West 1995) (Energy Reorganization Act); 42 U.S.C.A. § 6971 (West 1995) (Solid Waste Disposal Act); 42 U.S.C.A. § 7622 (West 1995) (Clean Air Act); 42 U.S.C.A. § 9610 (West 1995) (Comprehensive Environmental Response Compensation & Liability Act).

6. *Connecticut Dep't of Environmental Protection v. OSHA*, 138 F. Supp. 2d 285 (D. Conn. 2001); *Florida v. United States*, 133 F. Supp. 2d 1280 (N.D. Fla. 2001); *Ohio Environmental Protection Agency v. United States Dept. of Labor*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000); *Rhode Island v. United States*, 115 F. Supp. 2d 269 (D. R.I. 2000).

7. *See Wong-Opasi v. Tennessee*, 2000 OCAHO LEXIS 2 (Jan. 11, 2000); *Elhaj-Chehade v. University of Texas*, 1999 OCAHO LEXIS 3 (Jan. 28, 1999); *Kupferberg v. University of Oklahoma Health Sciences Center*, 1994 OCAHO LEXIS 99 (Nov. 21, 1994).

The decision of the court of appeals in this case has nationwide ramifications that threaten the traditional enforcement mechanisms of federal regulation. Extending the reach of State sovereign immunity to administrative proceedings permits state entities to violate federal law with impunity. Whistleblowers and other employees will be vulnerable to discharge and employment discrimination for which they have no relief. This lack of personal recourse hardly encourages the reporting by state employees of violations of federal environmental law. By the same token the members of the *amici curiae* submitting this brief will be virtually powerless to vindicate their shipping law rights against state port authorities, which act not as governmental regulators but as private entrepreneurs. The suggestion that the federal agencies themselves can effectively compel States' compliance with federal law[8] suffers from a naively optimistic appraisal of the capabilities and resources of federal regulatory bodies. *See Alden v. Maine*, 527 U.S. 706, 810 (1999) (Souter, J., dissenting).

C. Decision Below Contravenes The Constitutional Plan

What is needed is this Court's refinement of the doctrine of State sovereign immunity to assure a faithful adherence to the constitutional plan as it has been understood over the past century in the establishment and development of the regime of federal regulation. "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819).

8. The doctrine of state sovereign immunity does not shield the States from suits brought by the Federal Government. *Alden v. Maine*, 527 U.S. 706, 755-56 (1994); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934); *United States v. Texas*, 143 U.S. 621, 644-45 (1892).

To subject state instrumentalities engaged in commercial activities that fall within the objects committed by the Constitution to the Federal Government to regulation under applicable federal law by duly constituted federal regulatory agencies does no violence to the inherent nature of state sovereignty. What it does do is confirm and give effect to the longstanding understanding of all those private and governmental commercial enterprises operating within the realm of federal regulation that State sovereign immunity has never sanctioned special treatment for state commercial instrumentalities. The mark of effective regulation is evenhandedness. State commercial entities and private market participants expect a level playing field where they are subjected to the same regulatory obligations, including the need to respond to complaints before federal regulators for alleged violations of federal law.

> When a State engages in ordinary commercial ventures, it acts like a private person, outside the area of its "core" responsibilities, and in a way unlikely to prove essential to the fulfillment of a basic governmental obligation. A Congress that decides to regulate those state commercial activities rather than to exempt the State likely believes that an exemption, by treating the State differently from identically situated private persons, would threaten the objectives of a federal regulatory program aimed primarily at private conduct.

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 694-95 (1999) (Breyer, J. dissenting) (citations omitted).

Regulation of maritime commerce was one of the objects committed exclusively to the Federal Government. *See* U.S. CONST. art. I, § 8, cl. 3, 10; art. I, § 9, cl. 5, 6; art. I,

§ 10, cl. 2, 3. The need to repose regulatory power over maritime commerce exclusively in the Federal Government to thwart the Balkanizing effects of the States' parochial intervention was one of the reasons for the adoption of the Constitution. *See United States v. Locke*, 529 U.S. 89, 99 (2000). The plan of the convention, therefore, called for the States to surrender to the Federal Government sovereignty over the regulation of maritime commerce.

The constitutional grant of sovereignty to the Federal Government over maritime commerce was not conditional. The power to regulate includes the adoption of not only substantive law but also appropriate remedies and procedures essential to the fulfillment of the regulatory objectives embodied in the substantive provisions. By engaging in the profit-making operation of marine terminals in their ports, the States implicitly surrender their sovereignty and submit to the regulatory sovereignty over maritime commerce they granted exclusively to the Federal Government in the constitutional compact. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991).

Inherent in this submission to the sovereignty of the Federal Government is the acceptance of the regulatory rules both substantive and procedural enacted by the Federal Sovereign. That the regulatory regime includes having to defend complaint proceedings brought by private persons does not constitute coercive and disrespectful overriding of the sovereign immunity of the States. The state commercial instrumentality in this case voluntarily chose to engage in an enterprise which it well knew fell within the regulatory sovereignty of the Federal Government. To submit to the regulatory jurisdiction of the Federal Maritime Commission, the agency entrusted by Congress with the enforcement of federal shipping laws, is perfectly consistent with the constitutional plan, which South Carolina and all the other States have ratified.

CONCLUSION

The novel extension by the court of appeals in this case of the State sovereign immunity doctrine to administrative proceedings before federal agencies imposes a constitutionally unwarranted burden upon the federal regulatory system. The ramifications nationwide on the enforcement of federal shipping laws and other regulatory statutes support the need for review by this Court. A writ of certiorari will enable the Court to review a substantial constitutional question that it has not yet addressed and establish an appropriate definition of State sovereign immunity that will promote a federalism that binds the States to the sovereignty they granted to the Federal Government to regulate maritime commerce. The petition of the Federal Maritime Commission should be granted, and a writ of certiorari issued to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Supreme Court, U.S.
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No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: JULY 10, 2001
CERTIORARI GRANTED: OCTOBER 15, 2001

TABLE OF CONTENTS

	Page
Docket Entries, Federal Maritime Commission	1
Docket Entries, United States Court of Appeals for the Fourth Circuit	3
Complaint of South Carolina Maritime Services, Inc.	7
Answer of the South Carolina State Ports Authority	18
Motion to Dismiss of the South Carolina State Ports Authority ..... (The exhibits attached to the Motion to Dismiss have not been included in this Appendix; the exhibits appear in the joint appendix filed in the court of appeals at pages 51-84)	27
Response to Motion to Dismiss of South Carolina Maritime Services, Inc. ..... (The exhibits attached to the Response have not been included in this Appendix; the exhibits appear in the joint appendix filed in the court of appeals at pages 96-166)	49

NOTICE

The following items have been omitted in printing this Appendix because they appear on the following pages in the printed and separately-bound appendix to the petition for a writ of certiorari:

Order of Presiding Administrative Law Judge Norman D. Kline entitled "Motion of Respondent South Carolina State Ports Authority to Dismiss Complaint Granted" (dated Jan. 5, 2000)	39a

Order of the Federal Maritime Commission entitled "Order Reversing the Administrative Law Judge's Order and Remanding for Further Proceedings" (dated March 23, 2000) 27a

Opinion of the court of appeals (dated March 12, 2001). . 1a

FEDERAL MARITIME COMMISSION

Docket No. 99-21

SOUTH CAROLINA MARITIME SERVICES, INC.

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

DOCKET ENTRIES

DATE	PROCEEDINGS
10/25/99	Received Complaint.
10/27/99	Served Notice of Filing of Complaint and Assignment. (Initial decision due October 27, 2000; final decision due April 9, 2001).
10/28/99	Served Notice of Assignment by ALJ Norman D. Kline.
11/16/99	Received Answer.
11/19/99	Received Motion of Respondent South Carolina State Ports Authority to Dismiss Complaint.
12/6/99	Received Complainant's Response to Respondent's Motion to Dismiss.
12/9/99	Served Order to Supplement the Record.
12/27/99	Received Complainant's Supplementation of its Response to Respondent's Motion to Dismiss.

DATE	PROCEEDINGS
1/5/00	Served Motion of Respondent South Carolina State Ports Authority to Dismiss Complaint Granted.
2/3/00	Served Notice of Filing of Commission Review.
3/23/00	Served Order Reversing the Administrative Law Judge's Order and Remanding for Further Proceeding.
3/31/00	Served Notice of Prehearing Conference.
4/4/00	Served Notice of Additional Matters to be Discussed at Prehearing Conference.
4/5/00	Served Notice of Cancellation of Prehearing Conference.
4/20/00	Received Motion of South Carolina State Ports Authority for a Stay of Proceeding Pending Review.
5/10/00	Served Respondent's Motion to Stay Proceeding Pending Judicial Review Granted.
10/26/00	Served Notice of Suspension of Procedural Schedule.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SOUTH CAROLINA STATE PORTS AUTHORITY

v.

FEDERAL MARITIME COMMISSION, ET AL.

DOCKET ENTRIES

DATE	PROCEEDINGS
4/21/00	Petition for review filed [3173157-1] (dhb)
4/24/00	Agency review docketed. (dhb)
	* * * * *
5/16/00	Certified list filed in lieu of record. [00-1481] (dhb)
	* * * * *
7/20/00	Brief joint appendix filed by Petitioner SC State Ports Auth. Type of Service: HD Copies of brief: 8 # brf pages: 56 Copies of apx: 6 # apx pages: 225 Sufficient?[Y/N]: Y 2-sided copying: Y [00-1481] Respondent brief due 8/21/00 for US, for FMC. (aww)
	* * * * *
8/1/00	Amicus curiae brief filed by Amicus Curiae State of Maryland, Amicus Curiae State of Alabama, Amicus Curiae State of Arkansas, Amicus Curiae State of Connecticut, Amicus Curiae State of Delaware, Amicus Curiae State of Florida, Amicus Curiae State of

DATE	PROCEEDINGS
	Georgia, Amicus Curiae State of Iowa, Amicus Curiae State of Louisiana, Amicus Curiae State of Maine, Amicus Curiae State of Mississippi, Amicus Curiae State of Montana, Amicus Curiae State of Nevada, Amicus Curiae State of NC, Amicus Curiae State of ND, Amicus Curiae State of Oklahoma, Amicus Curiae State of Oregon, Amicus Curiae State of SC, Amicus Curiae State of SD, Amicus Curiae State of Virginia, Amicus Curiae State of WV. Type of Service: Per Clerk Order # am.br copies: 8 Sufficient[Y/N]?: Y.. [00-1481] (aww)
	* * * * *
9/11/00	Amicus curiae brief filed by Amicus Curiae NAWE. Type of Service: Per Clerk Order # am.br copies: 8 Sufficient[Y/N]?: Y. . [00-1481] (aww)
9/20/00	Brief filed by Respondent FMC. Type of Service: CD Copies: 8 # brf pages: 85. Sufficient [Y/N]: Y. .. [00-1481] (aww)
9/20/00	Brief filed by Respondent US. Type of Service: PM Copies: 8 # brf pages: 48. Sufficient [Y/N]: y. .. [00-1481] (wtc)
	* * * * *
10/18/00	Reply brief filed by Petitioner SC State Ports Auth. Type of Service: CD Copies of brief: 8 # brf pages: 216. Sufficient [Y/N]: Y. .. [00-1481] (aww)
	* * * * *
12/15/00	COURT ORDER filed granting motion of State of Maryland to participate in oral arg on

DATE	PROCEEDINGS
	the time ceded by petitioner [3281366-1], denying motion of NAWE to participate in oral arg [3270266-1] Copies to all counsel. [00-1481] (dhb)
12/29/00	Motion filed by Petitioner SC State Ports Auth, Respondent FMC, Respondent US for additional argument time of 30 minutes [3308624-1]. [00-1481] (db)
1/3/01	ORDER FILED granting motion for additional argument time [3308624-1]. Copies to all counsel. [00-1481] (mst)
1/22/01	Oral argument heard. Courtroom Deputy: JLC, Jr. [00-1481] (jc)
	* * * * *
3/12/01	Published, authored opinion filed. [00-1481] (dhb)
3/12/01	Judgment order filed. Decision: reversed and remanded with instructions to dismiss. EOD Date: 3/12/01. [00-1481] (dhb)
4/25/01	Federal Reporter Citation: 243 F.3d 165. [00-1481] (vsł)
5/2/01	Motion filed by Respondent FMC to stay the mandate pending petition for writ of certiorari [00-1481] (dhb)
5/4/01	COURT ORDER filed denying motion to stay mandate [3380542-1] Copies to all counsel. [00-1481] (dhb)
5/4/01	Mandate issued. [00-1481] (dhb)
5/23/01	Notice of Supreme Court action taken. Type of action taken: extension of time granted for filing certiorari. [00-1481] (jh)

DATE	PROCEEDINGS
7/16/01	Supreme Court notice that petition for certiorari was filed on 07/10/01. Spct No.: 01-46 Spct Pty 1: Federal Maritime Commission Spct Pty 2: SC State Ports Authority. [00-1481] (dhb)
10/19/01	Supreme Court order received granting petition certiorari [3421886-1] on 10/15/01. [00-1481] (dhb)

BEFORE THE FEDERAL MARITIME COMMISSION

Docket No. 99-21

[Filed Oct. 25, 1999]

SOUTH CAROLINA MARITIME SERVICES, INC.,
Complainant,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

COMPLAINT

NOW COMES South Carolina Maritime Services, Inc. ("Maritime Services"), as complainant, and files this complaint against the South Carolina State Ports Authority ("Ports Authority"), respondent herein, showing the Commission as follows:

PARTIES

1. Maritime Services is a corporation organized and existing under the laws of South Carolina with a principal place of business at 44 Seagrass Lane, Isle of Palms, South Carolina 29451. Maritime Services is the charterer of the M/V TROPICANA a/k/a M/V TROPIC SEA and is a common carrier engaged in the business of providing transportation of passengers for hire.

2. The Ports Authority, upon information and belief, is a political agency, entity, body and/or subdivision of the State of South Carolina, and is a marine terminal operator engaged in the business of furnishing wharfage and other terminal

facilities in connection with ocean common carriage. The Ports Authority's address is P.O. Box 22287, Charleston, South Carolina 29413-2287.

JURISDICTION AND VENUE

3. Jurisdiction is proper under the Shipping Act of 1984, 46 U.S.C. §§ 1701 - 1721, which regulates, among other things, marine terminal operators and persons engaged in the United States in the business of furnishing wharfage and other terminal facilities in connection with common carriage.

STATEMENT OF FACTS

The Charter Party

4. On or about November 9, 1998, Maritime Services entered into a time charter party with Jubilee of the Bahamas, Inc. ("Jubilee"), the owner of the M/V TROPIC SEA. Pursuant to the terms of the charter party, Maritime Services is to provide and pay for all costs relating to passenger service matters, including embarkation, debarkation, the hotel department, catering, beverage service, entertainment, shore excursions, concessionaire operations, cleaning, hotel department equipment, passenger accommodation, and all deck areas accessible to the public. Maritime Services is also to pay for fuel and lube oils, port charges, pilotage, boatage, tug assistance, taxes, and all dock, harbor and tonnage dues. Maritime Services is to pay charter hire at the rate of $17,500 per day.

The Vessel

5. The M/V TROPIC SEA is a 383' ocean-going passenger vessel owned by Jubilee and operated by Tropicana Cruises International, Inc. The vessel's port registry is Nassau, Bahamas. The M/V TROPIC SEA is a foreign-flagged vessel flying the Bahamian flag. The M/V TROPIC SEA is certified by Lloyd's Register of Shipping as

being in compliance with her class standards, as defined by the laws of the Commonwealth of The Bahamas.

6. The M/V TROPIC SEA is equipped with six decks, five of which are designated for passenger access. The "A" deck contains ten officer's staterooms and passenger staterooms. The "B" deck is equipped with a small casino, bar, gift shop, main lounge with bar, and open deck featuring a bar and swimming pool. The "C" deck contains buffet tables, a bar, a restaurant, and the main casino. The "D" deck contains passenger staterooms, the main galley, officer and staff mess area, and additional machinery spaces. The "E" deck contains passenger staterooms, refrigeration and freezer space for food storage, and machinery spaces. The "Tank Top" deck contains the main engine room and potable water tanks. The "Bridge" deck houses the wheel house and various stacks and vents.

7. The two casinos on the M/V TROPIC SEA feature blackjack tables, roulette wheels, crap tables, a mini-baccarat table, stud poker tables, and video poker machines.

Maritime Services' Operations From The Port of Charleston

8. Maritime Services intends to offer passenger cruises from the Port of Charleston consisting of "cruises to nowhere" and cruises to The Bahamas. Maritime Services intends to offer "cruises to nowhere," whereby the M/V TROPIC SEA will depart from Charleston, proceed to international waters for a period of hours and then return to Charleston with no intervening ports of call. While the vessel is in international waters, passengers may enjoy the benefit of gambling in the vessel's casinos. Maritime Services also intends to offer cruises to The Bahamas, which will consist of a three-day voyage from Charleston to The Bahamas, and back again

9. During these voyages, Maritime Services will offer numerous activities for its passengers, including dining service, bar service, entertainment (including dancing, live

musicals, piano bar, and live band), bingo, casino games, and various games for the passengers' children. Gambling operations will only be conducted while the vessel is in international waters, and will not occur in South Carolina territorial waters.

Maritime Services' Negotiations With The Port Authority To Obtain Berthing Space And Passenger Services For The M/V TROPIC SEA

10. By letter dated November 24, 1998, addressed to William A. McClean ("McClean"), Vice President of Operations for the Ports Authority, Frank Guarino ("Guarino"), President of Maritime Services, requested berthing space for the M/V TROPIC SEA for December 17 - 20 and 31, 1998, as well as January 1 - 3, 1999. Maritime Services also requested information on any and all fees, tariffs, taxes or port charges associated with the berthing space.

11. By letter dated December 10, 1998, McClean rejected Maritime Services request for berthing space, citing City of Charleston Ordinance Section 21-176, which prohibits the operation of gaming vessels within the corporate limits of Charleston.

12. By letter forwarded via facsimile dated June 24, 1999, to McClean, Guarino requested berthing space for the vessel on July 1 - 5, 1999. Maritime Services again requested information on any and all fees, tariffs, taxes or port charges associated with the berthing space.

13. By letter dated June 28, 1999, McLean rejected Maritime Services' request for berthing space, again citing City of Charleston Ordinance Section 21-176.

14. By letter dated July 7, 1999, addressed to "Marketing/Sales, State Port Authority," M.J. Shaw ("Shaw"), General Manager and Director of Operations for Maritime Services, demanded berthing space for the M/V TROPIC SEA at the Ports Authority. In the facsimile,

Maritime Services advised the Ports Authority that the charter hire for the vessel was costing Maritime Services approximately $18,000.00 per day.

15. By facsimile dated July 8, 1999, Suzanne M. Kaiser ("Kaiser"), the Special Projects Coordinator for the Ports Authority, replied to Maritime Services that the Ports Authority could not accommodate berthing space for the M/V TROPIC SEA because the vessel is a gaming ship and the Ports Authority's policy prohibits berthing of gaming vessels.

16. By letter dated July 14, 1999, addressed to McLean, Maritime Services, pursuant to the request of the Ports Authority, set forth in writing its intentions for its passenger cruise business in Charleston. Maritime Services noted that it was again requesting berthing space for the M/V TROPIC SEA for "passenger cruises." These cruises would include regular voyages to The Bahamas and candlelight "cruises to nowhere" from the Port of Charleston. Maritime Services offered to provide security for any financial concerns the Ports Authority might have.

17. By letter dated July 17, 1999, addressed to Kaiser, Maritime Services requested a meeting with the Ports Authority to resolve the berthing issue.

18. By letter dated July 19, 1999, legal counsel for the Ports Authority denied Maritime Services' request for berthing space. Counsel advised that the M/V TROPIC SEA is a gaming vessel and the policy of the Ports Authority is not to provide facilities for gaming vessels.

19. On or about August 12, 1999, Shaw, Guarino, and counsel for Maritime Services met with Anne Moise, Kaiser, and counsel for the Ports Authority wherein Maritime Services again requested berthing space at the Ports Authority. The representatives of the Ports Authority advised that the Ports Authority would not provide berthing space because the Ports Authority had a policy, approved by its Board, against permitting gaming ships to utilize its passenger terminal.

20. By letter dated August 13, 1999, addressed to Kaiser, Maritime Services advised the Ports Authority that its actions in refusing to provide a berth for the M/V TROPIC SEA constitute a violation of The Shipping Act of 1984, 46 U.S.C. §§ 1701-1721. Specifically, Maritime Services advised the Ports Authority that its actions in refusing to provide a berth violated 46 U.S.C. § 1709(d)(3) of the Act, which prohibits marine terminal operators such as the Ports Authority from giving any undue or unreasonable preference or advantage to any person or imposing any undue or unreasonable prejudice or disadvantage to any person. Maritime Services noted that the Ports Authority had refused to provide a berth for the MV/TROPIC SEA because it is a gaming vessel. Yet, the Ports Authority continued to provide berthing space and passenger services for other cruise lines offering gambling during "cruises to nowhere" and other cruises.

21. By letter dated August 24, 1999, counsel for the Ports Authority again denied Maritime Services' request for a berthing space for the vessel. Again, the Ports Authority stated that its policy prohibits providing space for vessels whose primary purpose is gambling.

Ports Authority's Dealings With Other Vessels Operating "Cruises To Nowhere"

22. Prior to May 28, 1999, Carnival Cruise Lines advertised overnight "cruises to nowhere" aboard the M/S INSPIRATION, which would depart Charleston on Friday, May 28, 1999, and Saturday, September 11, 1999, returning to Charleston the following day with no intervening ports of call. For both "cruises to nowhere" aboard the M/S INSPIRATION, the vessel provided gambling activities to the passengers while the vessel was in international waters. Gambling was conducted in the vessel's 7500 square foot casino, which features slot machines, blackjack, roulette, Caribbean stud poker, wheel of fortune, bingo, and MegaCash, advertized by Carnival as the world's largest cruise ship jackpot.

23. The M/S INSPIRATION is an 855' ocean-going passenger vessel, flying the foreign flag of Panama. During the "cruises to nowhere" from Charleston, Carnival offered numerous activities for its passengers, including dining service, bar service, entertainment, bingo, casino games, and various other services. Gambling operations were conducted while the vessel was in international waters, and did not occur while the vessel was in South Carolina territorial waters.

24. Despite the Ports Authority's policy of refusing to provide berthing space to gaming vessels, the M/S INSPIRATION boarded passengers on May 28, 1999, and September 11, 1999, at the Ports Authority's cruise ship terminal for these "cruises to nowhere."

25. Upon information and belief, the Ports Authority assessed charges against Carnival as set forth in the Ports Authority's "Terminal Tariff No. 8, Cruise Activity Charges," which sets forth the Ports Authority's per passenger charge as well as an additional charge for providing parking for the passengers' automobiles for these "cruises to nowhere." Passengers utilizing the Ports Authority's terminal for these "cruises to nowhere" aboard the M/V INSPIRATION were provided "cruise parking permits" by the Ports Authority. Upon information and belief, the Ports Authority also assessed other charges against Carnival for dockage, wharfage, and other services provided.

26. Presently, Carnival is advertising additional cruises from Charleston, including a two-night "cruise to nowhere" aboard the M/V CARNIVAL DESTINY on Friday, May 12, 2000, and a one-night "cruise to nowhere" aboard the M/V CARNIVAL VICTORY on Friday, October 6, 2000. As with the M/S INSPIRATION, these vessels will provide gambling in the vessels' casinos while the vessels are in international waters, and will depart and return to the Port of Charleston with no intervening ports of call. Carnival is also advertising a four-night cruise to The Bahamas, departing Charleston on Saturday, October 7, 1999.

27. Upon information and belief, the Ports Authority, pursuant to an agreement with Carnival, will provide berthing for Carnival's vessels at the Ports Authority's cruise ship terminal, and will assess per passenger charges and charges for parking at the rate set forth in the Ports Authority's tariff.

COUNT ONE - VIOLATION OF THE SHIPPING ACT INJUNCTIVE RELIEF

28. Maritime Services realleges and incorporates paragraphs 1 through 27 as if they were set forth herein.

29. The Shipping Act of 1984, 46 U.S.C. §§ 1701-1721, regulates, among other things, marine terminal operators and persons engaged in the United States in the business of furnishing wharfage and other terminal facilities in connection with common carriage.

30. Section 1709(b)(10) of the Shipping Act provides that no marine terminal operator, either alone or in conjunction with any other person, directly or indirectly, may unreasonably refuse to deal or negotiate. Section 1709(d)(4) of the Shipping Act provides that no marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.

31. The Ports Authority is a marine terminal operator within the meaning of the Shipping Act and is subject to the Shipping Act's prohibitions.

32. The Ports Authority's policy of not dealing with gaming vessels constitutes an unreasonable refusal to deal or negotiate and is unreasonably discriminatory in that the Ports Authority refuses to provide berthing space to Maritime Services for its "cruises to nowhere" and cruises to The Bahamas, yet provides berthing space to Carnival for its "cruises to nowhere" and cruises to The Bahamas. The Ports Authority's policy gives undue and unreasonable preference to cruise lines such as Carnival and imposes an undue and

unreasonable prejudice or disadvantage with respect to Maritime Services.

33. Pursuant to Section 1710(h) of the Shipping Act, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of the Shipping Act. Maritime Services hereby respectfully requests that the Commission file suit against the Ports Authority in the United States District Court for the District of South Carolina, Charleston Division, and seek a temporary restraining order and preliminary injunction enjoining the Ports Authority from engaging in its unreasonably discriminatory policy of refusing to provide berthing space and passenger services to Maritime Services for its cruises while at the same time providing berthing space and passenger services to cruise lines, such as Carnival, for its cruises.

COUNT TWO - VIOLATION OF THE SHIPPING ACT REPARATIONS

34. Maritime Services realleges and incorporates paragraphs 1 through 33 as if they were fully set forth herein.

35. Section 1710(g) of the Shipping Act provides that the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury, including loss of interest plus reasonable attorneys' fees.

36. Maritime Services hereby petitions the Commission to recover reparations from the Ports Authority for the Ports Authority's violations of the Shipping Act, specifically Sections 1709(b)(10) and 1709(d)(4), which caused actual injury to Maritime Services, including but not limited to loss of profits, loss of earnings, loss of sales, and loss of business opportunities. Maritime Services also seeks recovery of lost interest as well as its reasonable attorneys' fees incurred in the pursuit of this matter.

WHEREFORE, Maritime Services respectfully demands judgment and prays as follows:

(A) That this Commission seek a temporary restraining order and preliminary injunction in the United States District Court for the District of South Carolina, Charleston Division, enjoining the Ports Authority from utilizing its discriminatory practice to refuse to provide berthing space and passenger services to Maritime Services;

(B) That this Commission, after due notice and hearing, direct payment of reparations by the Ports Authority to Maritime Services, including sums sufficient to compensate Maritime Services for its actual injuries caused by the Ports Authority's discriminatory practices, as well as interest and reasonable attorneys' fees.

(C) That this Commission, after due notice and hearing, issue an order commanding the Ports Authority to cease and desist from the aforesaid violations of the Shipping Act; to establish and put in force such practices as the Commission determines to be lawful and reasonable; and that such other and further order or orders be made as the Commission determines to be proper in the premises.

(D) That this Commission award Maritime Services such other and further relief as is just and proper.

Respectfully submitted this 20th day of October, 1999

SOUTH CAROLINA MARITIME
SERVICES, INC.
By: /s/ Frank Guarino
Frank Guarino, President

44 Seagrass Lane
Isle of Palms, South Carolina 29451
(843) 886-5600

HUNTER, MACLEAN, EXLEY
& DUNN, P.C.
By: /s/ George M. Earle
George M. Earle
Attorneys for South Carolina
Maritime Services, Inc.

200 East Julian Street
Post Office Box 9848
Savannah, Georgia 31401
(912) 236-0261

VERIFICATION

State of South Carolina

County of Charleston

Frank Guarino, being duly sworn on oath, deposes and says that he is the President of South Carolina Maritime Services, Inc., complainant herein, and is the person who signed the foregoing complaint; that he has read the complaint and that the facts stated therein, upon information received from others, affiant believes to be true.

SOUTH CAROLINA MARITIME
SERVICES, INC.
By: /s/ Frank Guarino
Frank Guarino, President

44 Seagrass Lane
Isle of Palms, South Carolina 29451
(843) 886-5600

Sworn to and subscribed before me this
20th Day of October, 1999.
/s/ Mary B. Creech
Notary Public
My Commission Expires: 9-14-05

BEFORE THE FEDERAL MARITIME COMMISSION

[Filed Nov. 16, 1999]

SOUTH CAROLINA MARITIME SERVICES, INC.,
Complainant,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

ANSWER OF THE SOUTH CAROLINA STATE PORTS AUTHORITY

[Caption and List of Counsel Omitted in Printing]

ANSWER

Respondent South Carolina State Ports Authority ("SPA") files this answer to the Complaint of South Carolina Maritime Services, Inc. The SPA will file a Motion to Dismiss shortly. The Complaint is a wrongful attempt to invoke the Commission's jurisdiction. Congress, through the Johnson Act,[1] has specifically determined not to preempt state laws prohibiting and regulating gaming activities within their borders, including port calls by gaming vessels. The State of South Carolina, through statute and case law, prohibits gambling junkets, and the SPA will not permit its cruise facilities to be used to provide such services. Rather, the SPA's policy allows cruise ships to use its facilities only where gaming activities are not the primary purpose of the cruise.

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[1] Johnson Act, 15 U.S.C. § 1175. *See Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999).

The SPA has adhered to its policy in a non-discriminatory manner; however, should any determination be made to the contrary, the SPA will deny facilities to all vessels departing from and returning to Charleston for short-term "cruises to nowhere" with gambling devices on board, even where the primary purpose of the cruise is not gambling.

The following responds to each paragraph of the Complaint:[2]

PARTIES

1. The SPA, based upon information and belief, admits that Maritime Services is a corporation under the laws of South Carolina with a principal place of business at 44 Seagrass Lane, Isle of Palms, South Carolina 29451. Further, based on information and belief, the SPA admits Maritime Services is the charterer of the M/V TROPICANA, which is also known as the M/V TROPIC SEA. The SPA denies that Maritime Services is a common carrier engaged in the business of providing transportation of passengers for hire. Indeed, the SPA believes that Maritime Services is not authorized by either the Commission or the Coast Guard to engage in common carriage of passengers.

2. The SPA admits that it is an agency of the State of South Carolina. In addition, the SPA admits that it is a marine terminal operator at the Port of Charleston. The SPA denies it is a marine terminal operator with respect to all of its functions. The SPA admits its address is P.O. Box 22287, 176 Concord Street, Charleston, South Carolina 29413.

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[2] No discovery accompanied the Complaint. The SPA reserves the right under Rule 201 to commence discovery at an appropriate time should the Commission not grant the SPA's forthcoming Motion to Dismiss.

JURISDICTION AND VENUE

3. The SPA denies that jurisdiction before the Federal Maritime Commission is proper under the Shipping Act of 1984.

STATEMENT OF FACTS

The Charter Party

4. The SPA is without sufficient information to form a belief as to the truth of the matters alleged in paragraph 4 of the Complaint and therefore denies the same.

The Vessel

5. The SPA is without sufficient information to form a belief as to the truth of the matters alleged in paragraph 5 of the Complaint and therefore denies the same.

6. The SPA is without sufficient information to form a belief as to the truth of the matters alleged in paragraph 6 of the Complaint and therefore denies the same.

7. The SPA is without sufficient information to form a belief as to the truth of the matters alleged in paragraph 7 of the Complaint and therefore denies the same.

8. The SPA is without sufficient information to form a belief as to the truth of the matters alleged in paragraph 8 of the Complaint and therefore denies the same. Further, the SPA cannot know the future intentions of third parties.

9. The SPA is without sufficient information to form a belief as to the truth of the matters alleged in paragraph 9 of the Complaint and therefore denies the same. Further, the SPA cannot know the future intentions of third parties.

10. The SPA admits the existence of a letter dated November 24, 1998, addressed to William A. McLean, Vice President of Operations for the SPA. The content of said letter speaks for itself.

11. The SPA admits the existence of a letter dated December 10, 1998, from Mr. McLean. The content of said letter speaks for itself.

12. The SPA admits the existence of an undated letter addressed to Mr. McLean sent on or about June 24, 1999. The content of said letter speaks for itself.

13. The SPA admits the existence of a letter dated June 28, 1999, from Mr. McLean. The content of said letter speaks for itself.

14. The SPA admits the existence of a letter dated July 7, 1999, addressed to "Marketing/Sales, State Port Authority." The content of said letter speaks for itself.

15. The SPA admits the existence of a letter dated July 8, 1999, from Suzanne M. Kaiser. The content of said letter speaks for itself.

16. The SPA admits the existence of a letter dated July 14, 1999, addressed to Mr. McLean. The content of said letter speaks for itself.

17. The SPA admits the existence of a letter dated July 17, 1999, addressed to Ms. Kaiser. The content of said letter speaks for itself.

18. The SPA admits the existence of a letter dated July 19, 1999, from legal counsel for the SPA. The content of said letter speaks for itself.

19. The SPA admits that a meeting occurred on August 12, 1999. The SPA is without sufficient information to either deny or admit the remaining allegations in paragraph 19 and therefore denies the same. But, the SPA admits that its policy prohibits it from providing facilities to gaming vessels. The SPA admits the M/V TROPIC SEA is a gaming vessel and cannot be accommodated at an SPA terminal.

20. The SPA admits the existence of a letter dated August 13, 1999, addressed to Ms. Kaiser. The content of said letter speaks for itself.

21. The SPA admits the existence of a letter dated August 24, 1999, from legal counsel for the SPA. The content of said letter speaks for itself.

22. The SPA lacks sufficient knowledge or information upon which to either admit or deny the allegations regarding Carnival Cruise advertisements in paragraph 22, and therefore denies the allegations. The SPA does, however, admit that the M/S INSPIRATION called at Charleston on September 11-12, 1999, as described in paragraph 24 below.

23. The SPA admits that the M/S INSPIRATION is an 855' ocean-going passenger vessel. It lacks sufficient knowledge or information upon which to either admit or deny the remaining allegations in paragraph 23 of the Complaint and therefore denies the same.

24. The SPA admits that the M/S INSPIRATION called the Port of Charleston on September 11-12, 1999. Upon information and belief, the SPA believes that the M/S INSPIRATION embarked and disembarked passengers at Charleston on those days. The SPA lacks sufficient knowledge or information upon which to either admit or deny the remaining allegations in paragraph 24 of the Complaint and therefore denies the same.

25. The SPA admits the existence of "Terminal Tariff No. 8." The terms of said tariff, which can be found at http://www.port-of-charleston.com/tariff8.htm, speak for themselves. The SPA lacks sufficient knowledge or information upon which to either admit or deny the remaining allegations in paragraph 25 of the Complaint and therefore denies the same.

26. The SPA lacks sufficient knowledge or information upon which to either admit or deny the allegations in paragraph 26 of the Complaint and therefore denies the same.

27. The SPA denies that it has an agreement with Carnival Cruise Lines of the nature described in

paragraph 27 of the Complaint. It lacks sufficient information to either admit or deny the allegations regarding Carnival's future plans, and therefore denies the same. With regard to future cruises by any cruise line or other entity, the SPA denies that it will accommodate any vessel that offers a cruise, the primary purpose of which is to promote gaming.

COUNT ONE – VIOLATION OF THE SHIPPING ACT INJUNCTIVE RELIEF

28. To the extent Maritime Services realleges and incorporates paragraphs 1 through 27 as paragraph 28 of the Complaint, Respondent incorporates its responses to paragraphs 1 through 27 as its response to paragraph 28.

29. Paragraph 29 of the Complaint calls for a legal conclusion to which no response is required. To the extent a response is required, the terms of the Shipping Act of 1984 speak for itself.

30. Paragraph 30 of the Complaint calls for a legal conclusion to which no response is required. To the extent a response is required, the terms of 49 U.S.C. §§ 1709(b)(10) and 1709(d)(4) speak for themselves.

31. The SPA admits that it is a marine terminal operator with regard to some of its functions, and therefore subject to the Shipping Act, but denies that it is a marine terminal operator with regard to all its functions.

32. The SPA denies the allegations contained in paragraph 32 of the Complaint.

33. The statute speaks for itself. Further, the SPA denies that it is appropriate for the Federal Maritime Commission to file suit against the SPA in the U.S. District Court for the District of South Carolina. The SPA will file a motion to dismiss the complaint in this docket, which further describes the SPA's position on this issue.

COUNT TWO — VIOLATION OF THE SHIPPING ACT REPARATIONS

34. To the extent Maritime Services realleges and incorporates paragraphs 1 through 33 as paragraph 34 of the Complaint, Respondent incorporates its responses to paragraphs 1 through 33 as its response to paragraph 34.

35. The contents of the statute speak for itself.

36. The SPA denies that Maritime Services is entitled to reparations of any kind.

AFFIRMATIVE DEFENSES

In further answer and defense to Complainant's claims, the SPA states:

FIRST AFFIRMATIVE DEFENSE

Maritime Services is not a common carrier within the meaning of the Shipping Act of 1984.

SECOND AFFIRMATIVE DEFENSE

The Federal Maritime Commission does not have jurisdiction over the matter complained of in Maritime Services' Complaint. Congress, through the enactment of the Johnson Act,[3] has specifically determined not to preempt state laws prohibiting and regulating gaming activities within their borders, including port calls by gaming vessels.

THIRD AFFIRMATIVE DEFENSE

The Eleventh Amendment of the U.S. Constitution prohibits suits by private parties for reparations against the SPA.

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[3] Johnson Act, 15 U.S.C. § 1175. *See Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999).

FOURTH AFFIRMATIVE DEFENSE

The berthing policy of the SPA regarding gaming vessels is a proper exercise of State of South Carolina's police power.

FIFTH AFFIRMATIVE DEFENSE

Maritime Services' Complaint fails to state a claim for which relief may be granted. In the alternative, if the Commission determines that the complaint states a claim cognizable under the Shipping Act, the SPA will take appropriate remedial measures to eliminate any perceived discrimination or undue preference, as described on page 1 of this Answer.

WHEREFORE, the South Carolina State Ports Authority respectfully requests judgment in its favor.

Respectfully submitted,
/s/ Patricia N. Snyder
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ATTORNEYS FOR SOUTH CAROLINA STATE PORTS AUTHORITY

[Certificate of Service Omitted in Printing]

VERIFICATION

State of South Carolina
County of Charleston,

ss:

I, L Duane Grantham, being duly sworn on oath state that I am Executive Vice President of the South Carolina State Ports Authority and am the person who signed the foregoing answer; that I have read the answer and believe the facts stated therein to be true, based upon information known to myself and obtained from others.
/s/ L. Duane Grantham

SUBSCRIBED & SWORN to before me, a notary public in and for the State of South Carolina, County of Berkeley this 15 day of November, 1999.
/s/ Debra E. Thomas
My Commission expires: 11/2/2008

BEFORE THE FEDERAL MARITIME COMMISSION

[Filed Nov. 19, 1999]

SOUTH CAROLINA MARITIME SERVICES, INC.,
Complainant,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

MOTION OF RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY TO DISMISS COMPLAINT

[List of Counsel Omitted in Printing]

TABLE OF CONTENTS

I. Maritime Services' vessel, the TROPIC SEA, is a gaming vessel and its operation is prohibited .....3[JA 31]

II. Federal law explicitly permits states to regulate gaming vessels and the Commission has no authority to review state regulation .....5[JA 33]

III. The Complaint provides no basis for its request that the Commission file suit in Federal District Court against the SPA .....10[JA 37]

IV. Maritime Services has not established that it is a common carrier or that SPA is a "marine terminal operator" under the Shipping Act of 1984 ...11[JA 39]

V. Under the Eleventh Amendment of the U.S. Constitution, the SPA is a state agency and immune from suits in federal court .....14[JA 41]

VI. Maritime Services has not met the conditions precedent to operating and berthing a vessel and has not shown that it is disposed to comply with the Commission's rules .....17[JA 44]

VII. The Complaint wrongfully asks the Commission to review a decision made under recognized state police power. The Presiding Officer should dismiss the Complaint .....18[JA 45]

[Caption Omitted in Printing]

MOTION OF RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY TO DISMISS COMPLAINT

Respondent South Carolina State Ports Authority respectfully moves the Presiding Officer to dismiss the Complaint, which is a wrongful attempt to invoke the Commission's jurisdiction. The Complaint contends that the SPA has run afoul of the Shipping Act by refusing berth to a gaming vessel. But federal law, by its terms, does not preempt state laws that prohibit or regulate gaming activities within their borders. Indeed, in the Johnson Act, Congress expressly preserved the rights of states to regulate gaming. It withdrew all federal regulation over gambling conducted in state territorial waters, and permitted states to regulate gambling on vessels, even for voyages outside of those territorial waters. Thus, under the Johnson Act, the State of South Carolina remains free to regulate gambling and gaming devices within and beyond its territorial waters.

The vessel for which Complainant seeks berth at the Port of Charleston is a gaming vessel. As configured, the TROPIC SEA is objectively distinguishable from passenger cruise vessels in that it does not have overnight accommodations for every passenger, and the majority of its space is dedicated to gambling activities. Further, its proposed operations differ markedly from those of cruise lines. Its charterer, South Carolina Maritime Services, Inc. (Maritime Services), has indicated to the SPA its intention to provide regularly scheduled gambling junkets beyond the three-mile limit. By contrast, cruise lines embark or disembark passengers at the Port of Charleston on international cruises, and they make brief port calls on such cruises. On rare occasions, such as the May 28-29, 1999 Carnival overnight cruises referred to in paragraph 22 of the Complaint, a cruise operator has offered novelty cruises for promotional purposes. Thus, both the Complainant's vessel

and the primary purpose of its proposed voyages are objectively distinguishable from others operated at the port.

Since the Port administers a reasonable, nondiscriminatory policy in conformity with South Carolina state law, the Complaint, in essence, asks the Commission to review the reasonableness of, and preempt, state law regarding gaming within its borders. The Shipping Act does not confer such authority on the Commission. Instead, Congress allows individual states to prohibit gambling vessels from operating via the ports and territorial waters of each individual state.

Further, Maritime Services has failed to demonstrate either to the SPA or to the Commission that it is qualified to operate the services it proposes. Despite the allegation in paragraph 1 of the Complaint that it is a "common carrier engaged in the business of providing transportation of passengers for hire," the SPA could find no evidence that the Commission has issued Maritime Services a Certificate of Financial Responsibility (Performance), which a passenger carrier must have even before it begins to hold out or advertise services. Nor does it appear to qualify for operations under Coast Guard regulations, since the SPA could find no evidence that Maritime Services has obtained the required Oil Pollution Certificate.[1] The SPA has the right to insist that vessels using its facilities are qualified, and Complainant has not shown that it is. Complainant's failure to follow even the most fundamental Commission rules, the requirement to verify complaints, further shows a disposition towards ignoring the rules.

Finally, the Eleventh Amendment of the U.S. Constitution prohibits the Commission from awarding reparations against

[1] Counsel for the SPA has contacted the Coast Guard, which reported that Complainant does not have the required Oil Pollution Certificate. Although the vessel's owner has such a certificate, ordinarily, a charterer must also establish its financial responsibility for water pollution.

the SPA, an instrumentality and agency of the State of South Carolina. Even for those controversies within the Commission's jurisdiction (and this one is not) the Commission cannot, consistent with the Eleventh Amendment, make a state agency pay damages to a private company.

The Presiding Officer should dismiss the Complaint because it fails properly to invoke the Commission's jurisdiction. The SPA further asks the Commission to grant such other relief as it deems proper in the circumstances.

I. Maritime Services' vessel, the TROPIC SEA, is a gaming vessel and its operation is prohibited.

Maritime Services alleges that the SPA's denial of berthing space was unreasonable in that the SPA allegedly permits similar vessels to berth at the Port of Charleston. This is not true. The SPA policy permits passenger vessels to berth so long as their primary purpose is not gambling, consistent with South Carolina law and the SPA's policy.

> The SPA adopted the following policy on gaming vessels in 1988:
>
> It is the policy of the South Carolina State Ports Authority to provide facilities for cruise vessels. Cruise facilities are not however to be used in any way for the promotion of gambling or gaming junkets. Although most cruise ships have small casinos on board which are open when on the high seas these facilities constitute a very small percentage of the overall recreational facilities available to the passenger and can in no way be construed as the primary activities offered or as the purpose of the cruise.
>
> No cruise line or company shall be allowed through its facilities offered or promotion effort to make gaming the primary purpose of its cruises. Any

> intimation that such a plan or effort is proposed or in effect will be grounds for immediate cancellation of all agreements with the line or company.

This policy reflects the values of the citizens of the State of South Carolina and the City of Charleston.[2]

Under that policy, the SPA has permitted passenger cruise vessels to make port calls and use facilities at the Port of Charleston. The vast majority of passenger vessel calls are routine embarkation, disembarkation, or port calls of cruise vessels on international journeys — vessels having overnight accommodations for every passenger and devoting most deck space to activities other than gambling. Before permitting the two 1999 cruises referred to in paragraph 22 of the Complaint, the SPA sought and received from Carnival Cruise Lines written assurance that the primary purpose of those cruises was to promote travel on Carnival's cruises, that the majority of its revenues derive from sources other than gambling, and that Carnival would not promote the cruises as gambling junkets.[3]

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[2] Exhibit A is a copy of some relevant South Carolina statutes: S.C.Code Ann. §§ 16-19-10 to 16-19-30 (prohibiting lotteries); 16-19-40 (prohibiting games of chance or gambling devices); 16-19-50 (prohibiting gaming tables); 16-19-60 (prohibiting coin-operated pinball machines); 16-19-120 to 16-19-130; 12-21-2710 to 12-21-2720 (Law. Co-op. 1976 & Supp. 1997). Exhibit B is a copy of S.C. Const. Art. XVII, § 7, which prohibits lotteries.
See also, Exhibit C, a copy of the City of Charleston Code §§ 21-176 and 21-179, prohibiting, *inter alia*, "gaming vessels," and the use and possession of gambling devices on "day cruises." The TROPIC SEA meets the definition of a "gaming vessel" under the ordinance because it does not provide overnight accommodations for all its passengers, and it is not primarily engaged in U.S. domestic or foreign transportation, unlike the Carnival Cruise Line vessels.

[3] *See City of New Orleans v. Dukes*, 427 U.S. 297 (1976) ("Legislatures may . . . adopt[ ] regulations that only partially ameliorate a perceived evil, . . . deferring complete elimination of the evil to future regulations."); *United States v. McDougherty*, 920 F.2d 569, 572 (9th Cir. 1990) (Legislature is not required to eliminate all evils in order to legislate against some).

By contrast, the TROPIC SEA cannot meet any of these tests and its proposed operations are clearly distinguishable. The TROPIC SEA is a gaming vessel. Although it can carry 800 people or more, it has overnight accommodations for only about 200. Unlike the occasional promotional tours Carnival and others have offered, Complainant apparently intends to make regular gambling junkets,[4] which is prohibited by South Carolina law and SPA policy.

II. Federal law explicitly permits states to regulate gaming vessels and the Commission has no authority to review state regulation.

In refusing to permit Maritime Services' gaming vessel use of SPA port facilities, the SPA has acted in accordance with relevant federal and state law.[5] In the Johnson Act,[6] Congress has explicitly recognized the preeminent state interests in controlling gambling and has sought to extend, not curb, state police power in this field.[7] Recent amendments to the Johnson Act confirm this explicit recognition.[8] The Shipping Act contains no authority to alter this statutory framework.

The Johnson Act reverses the ordinary preemption rules with respect to conflicting state and federal laws by

---

[4] Complaint, paragraphs 8 and 9.

[5] Exhibit D, 15 U.S.C. § 1175(b)(2)(A). *See, e.g.*, Exhibits A and B. *See also Leisure Time Cruise Corp., v. Town of Barnstable*, 1999 WL 613464, *5 (D.Mass. 1999) (citing *Padavan v. City of New York*, 685 N.Y.S.2d 35, 35-36 (N.Y. App.Div. 1999) (holding that 15 U.S.C. § 1175 "cannot be understood to deprive . . . municipalities of the prerogative, in the exercise of their police powers, to reasonably regulate the conduct of shipboard gambling businesses operating from within their jurisdictional bounds")).

[6] The Johnson Act is codified at 15 U.S.C. § 1175, and is reprinted in Exhibit D.

[7] *Casino Ventures v. Stewart*, 183 F.3d 307, 311 (4th Cir. 1999) (Exhibit E).

[8] *Id.* (citing 15 U.S.C. § 1175(a)-(b)).

expressly declaring Congress' intent to defer to state law.[9] The Act permits South Carolina to determine whether to admit gaming vessels into its waters. The statute provides:

> Section 1175. SPECIFIC JURISDICTIONS WITHIN WHICH MANUFACTURING, REPAIRING, SELLING, POSSESSING, ETC., PROHIBITED; EXCEPTIONS
>
> (a) It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18, including on a vessel documented under chapter 121 of Title 46 or documented under the laws of a foreign country.
>
> (b) Exception.
>
> (1) In general. Except as provided in paragraph (2), this section does not prohibit
>
> (A) the repair, transport, possession, or use of a gambling device on a vessel that is not within the boundaries of any State or possession of the United States;
>
> (B) the transport or possession, on a voyage, of a gambling device on a vessel that is within the boundaries of any State or possession of the United States, if—

[9] Cf. *U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491, 499 (interpreting a similar provision in the McCarran-Ferguson Act by which Congress restored the supremacy of the States over insurance regulation); *Blackfeet Nat. Bank v. Nelson*, 171 F.3d 1237, 1245 (11th Cir. 1999) (interpreting Congressional deference to the States in the McCarran-Ferguson Act); *Lac D'Amiante du Quebec v. American Home Assurance Co.*, 864 F.2d 1033, 1038-39 (3d Cir. 1988) (federal law provides for exclusive state regulation of the business of insurance).

> (i) use of the gambling device on a portion of that voyage is, by reason of subparagraph (A), not a violation of this section; and
>
> (ii) the gambling device remains on board that vessel while the vessel is within the boundaries of that State or possession;
>
> (2) Application to certain voyages
>
> (A) General rule. Paragraph (1)(A) does not apply to the repair or use of a gambling device on a vessel that is on a voyage or segment of a voyage described in subparagraph (B) of this paragraph if the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage or segment.[10]

Accordingly, since South Carolina has numerous statutes prohibiting and regulating gaming devices within its territory, any such activities are also federal crimes under section 1175(a). On July 6, 1999, the U.S. Court of Appeals for the Fourth Circuit upheld South Carolina's right to prohibit gambling on gaming vessels beyond South Carolina's three-mile territorial waters, rejecting the argument that federal law had preempted South Carolina law.[11] There, as here, the plaintiff sought to operate a gaming vessel. The court held that South Carolina's prohibition of such an operation is "aimed at promoting the welfare, safety, and morals of South Carolinians," and is "a well-recognized exercise of state policy power."[12]

[10] Exhibit D, 15 U.S.C. § 1175(b)(2)(A).
[11] *Casino Ventures, supra*, 183 F.3d at 311-13.
[12] *Id.*

In effect, the Complaint seeks Commission review of state law and policy in an area that Congress has specifically left to South Carolina. To the extent that the Complaint alleges discrimination based on an improper interpretation of state laws prohibiting gaming, it does not provide a basis for Commission review. Rather, the proper forum for the interpretation of South Carolina law in areas expressly reserved to the states is in a South Carolina state court.

In reality, the Complainant is asking the Commission to strike down state and federal laws under the guise of applying the non-discrimination provision of the Shipping Act. However, the SPA policy towards gaming vessels and the statutes underlying this policy are rational, do not violate any fundamental rights, and do not single out a suspect class for disparate treatment.[13] Accordingly, under federal and South Carolina state law, the SPA may treat illegal gaming activity differently from legal shipping activity.

Congress has deferred regulation and the outright prohibition of gaming vessels to the individual states. Any attempt by the Commission to interfere with this statutory scheme would likely violate the first prong of *Chevron*.[14] Further, the Complaint cites no basis in the Shipping Act for the Commission to grant Complainant any relief from these federal and state prohibitions on its gaming activities.

Complainant's bald allegation that the TROPIC SEA is a cruise ship and that it plans to make regular cruises to the Bahamas is apparently a fiction created in an attempt to establish federal jurisdiction. A voyage from Charleston to

[13] "The Constitution does not require things which are different in fact . . . to be treated as though they were the same." *Roller v. Gunn*, 107 F.3d 227, 234 (4th Cir. 1997) (citing *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

[14] *Nelson*, 171 F.3d at 1240-44 (finding Comptroller's interpretation of federal statute unreasonable, court allows state regulation of activity).

the Bahamas would take at least 24 hours. But the TROPIC SEA is classified as a ferry,[15] and cannot provide overnight accommodations for all its passengers. The Commission should reject this transparent attempt to circumvent the Johnson Act. A vessel whose primary purpose is gambling differs markedly from those used for cruises, where there are accommodations for each passenger, and where gambling is but a small part of the on-board entertainment. In the Johnson Act, Congress drew a similar distinction involving cruise vessels in the State of Alaska, by prohibiting that State from outlawing gaming on vessels providing "sleeping accommodations for all of its passengers."[16]

III. The Complaint provides no basis for its request that the Commission file suit in Federal District Court against the SPA.

Under section 11(h) of the Shipping Act, the proper party to seek an injunction is Complainant, not the FMC. Section 11(h)(2) unambiguously states that a complainant may seek an injunction after it has filed a Complaint with the FMC. On the other hand, it appears that the FMC must initiate an investigation before seeking an injunction. Section 11(h)(1). Complainant cites no reason why it should consume the Commission's resources to obtain a remedy that it can obtain for itself.[17] Its November 11, 1999 letter to Presiding Officer Norman D. Kline so acknowledged, and stated that "it

[15] *See, The Register of Ships* (Lloyds, August 13, 1999).

[16] Exhibit D, 15 U.S.C. § 1175(c)(1). As such, Congress, itself, has differentiated between vessels providing sleeping accommodations to all passengers and those which do not provide such accommodations.

[17] A Westlaw search of U.S. District Court cases and the Federal Maritime Commission database (FMRT-FMC) has failed to reveal a single case in which the Commission sought an injunction based on a private party's complaint under § 1710(h)(1). Rather, the Commission has consistently referred complainants to § 1710(h)(2). *See, e.g., TAK Consulting Engineers v. Sam Bustania, et al.*, 1998 WL 940847, *5 n. 2 (F.M.C. 1998); *Investigation and Relief from Unlawful Actions of the Trans-Atlantic Agrement*, 1994 WL 122248, *10 (F.M.C. 1994).

is likely" that Complainant will seek its own injunction, without using FMC resources.[18]

In any event, Maritime Services is not entitled to an injunction. Courts examine four factors in determining whether to grant an injunction: (1) Has Maritime Services made a strong showing that it is likely to prevail on the merits? (2) Has Maritime Services shown that without relief, it will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest? [19] Maritime Services, however, cannot meet any of the four factors.

In particular, Maritime Services has failed to show any likelihood of prevailing on the merits.[20] No discrimination has taken place. The TROPIC SEA is a gaming vessel, and is objectively distinguishable from other passenger vessels that call at the Port of Charleston. Moreover, the SPA's actions are consistent with the prevailing view that state and local bans on gaming vessels are lawful under the Johnson Act.[21] Finally, Maritime Services fails to allege that it provided the SPA, the Commission, or the Coast Guard the information they respectively require before granting permits to offer services, operate, or berth a passenger vessel.

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[18] Attached as Exhibit F.

[19] *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[20] In *Casino Ventures v. Stewart*, 23 F.Supp.2d 647, 652 (D.S.C. 1998), the plaintiff, who intended to operate a gaming vessel from Georgetown, South Carolina, sought a preliminary and permanent injunction enjoining South Carolina law enforcement officials from enforcing state criminal statutes. The court granted the plaintiff declaratory relief based upon a finding of federal preemption, but refused to grant a preliminary or permanent injunction. The finding of federal preemption was reversed on appeal. *Casino Ventures* 183 F.3d at 307.

[21] *Casino Ventures* 183 F.3d at 312-13; *Butterworth v. Chances Casino Cruises, Inc.*, 1997 WL 1068628 (M.D.Fla. 1997); *Padavan v. City of New York*, 685 N.Y.S.2d 35, 35-36 (N.Y.App.Div. 1999).

IV. Maritime Services has not established that it is a common carrier or that SPA is a "marine terminal operator" under the Shipping Act of 1984.

Complaints like this one, filed under the Shipping Act of 1984, can only be brought regarding matters that are subject to the Commission's jurisdiction. Maritime Services, as Complainant, bears the burden of proof to demonstrate that it is a common carrier within the meaning of the Shipping Act. However, Maritime Services has failed to allege any factual basis for finding Maritime Services to be a common carrier — a necessary prerequisite for Commission jurisdiction. Thus, the SPA respectfully requests the Presiding Officer to dismiss Maritime Services' Complaint under Rule 73.[22]

"The Shipping Act provides that only those persons engaged in the business of furnishing terminal facilities are subject to the Commission's jurisdiction."[23] Under the Shipping Act of 1984, common carrier service is a prerequisite for the exercise of Commission jurisdiction.[24] The Shipping Act defines a "marine terminal operator" as a person engaged "in the business of furnishing wharfage, dock, warehouse, or other terminal facilities *in connection with a common carrier* and a water carrier . . . ."[25] In this case, Maritime Services fails to establish jurisdiction in that it fails to allege or demonstrate that Maritime Services is such a carrier. As such, Maritime Services has failed to allege that the SPA ever furnished, was asked to furnish, or refused to furnish marine terminal services *in connection with either a common carrier or a water carrier*. Complainant bears the

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[22] Rule 73 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.73 (1999).

[23] *Puerto Rico Ports Auth. v. Federal Maritime Comm'n*, 919 F.2d 799, 802 (1st Cir. 1990).

[24] Shipping Act of 1984, § 3(14); 46 U.S.C. app. § 1702(14); *River Parishes Co. v. Ormet Primary Aluminum Inc.*, 1999 WL 125991 (1999).

[25] 46 U.S.C. app. § 1702(14); Shipping Act of 1984, § 3(14) (emphasis added).

burden of proof in establishing the Commission's jurisdiction.[26]

Case law establishes that a person may be subject to Commission jurisdiction with respect to some of its activities, but not with respect to others.[27] The SPA's status as a "marine terminal operator" in the Port of Charleston does not subject every activity to the Shipping Act's oversight, in particular, its relations with vessel operators that are not common carriers under the Shipping Act. Put another way, "the Commission has found in numerous cases that it does not have jurisdiction over everything that a marine terminal operator does."[28] The mere act of a state agency administering a policy that reflects federal and state prohibitions with regard to illegal gaming voyages does not fall within the definition of "marine terminal operator."

Further, because Maritime Services has failed to comply with the FMC's regulations concerning financial responsibility, it is not eligible to be a common carrier within the meaning of the Shipping Act. A common carrier is "a person holding itself out to the general public to provide transportation by water."[29] Yet because Maritime Services has not yet obtained a Certificate of Financial Responsibility (Performance), it is not authorized to hold itself out to provide such transportation.[30] Maritime

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[26] *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1222 (1990).

[27] *Puerto Rico Ports Auth.*, 919 F.2d at 803 (furnishing terminal facilities in one port does not make a company a marine terminal operator within the meaning of the Shipping Act at a different port).

[28] *Burlington Northern R.R. Co. v. M.C. Terminals, Inc.*, 26 S.R.R. 683, *rev'd on other grounds*, 26 S.R.R. 934 (F.M.C. 1993); *River Parishes Co. v. Ormet Primary Aluminum Corp.*, 27 S.R.R. 621, 625 (1997).

[29] Shipping Act § 3(6) (definition of a common carrier).

[30] 46 C.F.R. § 540.3 ("No person in the United States may arrange, offer, advertise or provide passage on a vessel unless a Certificate (Performance) has been issued to or covers such person").

Services' failure to do so is fatal because it bears the burden of showing that its invocation of Commission jurisdiction is proper.[31]

V. Under the Eleventh Amendment of the U.S. Constitution, the SPA is a state agency and immune from suits in federal court.

The SPA is entitled to Eleventh Amendment immunity from suit.[32] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This language has resulted in the presupposition that "each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the State's] consent."[33] "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional

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[31] 5 U.S.C. § 556(d); 46 C.F.R. § 502.155 (burden of proof is on the proponent of an order); *River Parishes Co. v. Ormet Primary Aluminum Corp., 1999* WL 125991 (1999); *California Shipping Line*, 25 S.R.R. at 1222.

[32] *Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051, 1055 (4th Cir. 1995) (finding the State Ports Authority to be an alter ego of the State of South Carolina under *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994)); *see also Auer v. Robbins*, 519 U.S. 452, 455 n.1 (1997) (reaffirming "arm of state" test for purposes of Eleventh Amendment analysis).

[33] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 53-54 (1996); *Port Auth. Trans-Hudson Corp. v. Fenney*, 495 U.S. 299, 304 (1990) (citing numerous Supreme Court decisions holding States are immune from suits brought in federal courts by their own citizens).

authorization of suits by private parties against unconsenting States."[34]

Under the Eleventh Amendment, Maritime Services cannot bring an action for monetary damages before the Commission for alleged injuries arising from the SPA's activities. In its Complaint, Maritime Services admitted that the SPA is "a political agency, entity, body and/or subdivision of the State of South Carolina."[35] Under South Carolina law, the SPA is a state agency with jurisdiction over certain South Carolina harbors and seaports.[36] The SPA is responsible for developing and improving those harbors and seaports, including promoting shipping and commerce.[37] The SPA also has jurisdiction to investigate rates and rate structures affecting the shipment of freight[38] and to supervise terminal facilities to assure the security and accommodation of the public.[39]

Although the Commission can investigate a state government's practices that fall under the Shipping Act, the Eleventh Amendment prohibits individuals from "suing" a state for reparations or injunctive relief under the "Judicial powers of the United States." In *California v. United States*[40] the Supreme Court upheld federal oversight of state activities that fall under the Interstate Commerce Clause; however, it does not allow an individual

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[34] *Seminole Tribe*, 517 U.S. at 72 (rejecting view that congressional statutes adopted under the Interstate Commerce Clause can limit the scope of Eleventh Amendment immunity).

[35] Complaint at 2.

[36] S.C. Code Ann. §§ 54-3-120 (jurisdiction over ports) and 54-3-810 (Law Co-op. 1992) (jurisdiction over the harbor and bays of Charleston and the rivers and creeks flowing into them).

[37] S.C. Code Ann. § 54-3-130 (Law Co-op. 1992) (purposes of Authority).

[38] *Id.*

[39] S.C. Code Ann. § 54-3-410 (Law Co-op. 1992) (obligation to supervise terminal facilities).

[40] 320 U.S. 577 (1944).

to sue a state.[41] Rather, in *California*, the district court and the Supreme Court upheld the power of a federal regulatory body under the Interstate Commerce Clause to investigate a state agency's practices.[42] An investigation, however, is entirely different than the filing of a suit for reparations.[43]

Further, a state does not consent to suit in federal court merely by consenting to suit in courts of its own creation.[44] Nor does it consent to suit in federal court by stating its intention to sue or be sued,[45] or even by authorizing suits in any court of competent jurisdiction.[46] Thus, the SPA has not waived its Eleventh Amendment immunity in this proceeding.

In addition, the Constitution prohibits the federal government from exercising its powers in a manner that allows Maritime Services to sue the State of South Carolina under the "Judicial power of the United States." As such,

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[41] *See Seminole Tribe*, 517 U.S. at 71-74 (The powers granted to Congress in Article I of the U.S. Constitution cannot be used to circumvent limitations placed upon federal jurisdiction by the Eleventh Amendment of the U.S. Constitution).

[42] *California v. United States*, 46 F.Supp. 474 (N.D.Cal. 1942) (upholding authority of the United States Maritime Commission to conduct investigation and order State's compliance with Shipping Act).

[43] *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146-47 (1993) (Eleventh Amendment serves to avoid the "indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."); *In re Maritime Administration*, 1991 WL 383090 (Petition No. P1-90) (acknowledging the judicial function of the Federal Maritime Commission); *Sea Dragon Navigation Ltd., et al.*, 1998 WL 940829, *6 (investigation commenced by regulatory agency to inform itself regarding possible violations of the Shipping Act is not derived from judicial function).

[44] *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 119 S.Ct 2219, 2226 (1999) (citing *Smith v. Reeves*, 178 U.S. 436, 441-445 (1900)).

[45] *College Sav. Bank*, 119 S.Ct. at 2226 (citing *Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-50 (1981)).

[46] *College Sav. Bank*, 119 S.Ct. at 2226 (citing *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-79 (1946)).

the Constitution prohibits Congress from passing a statute authorizing Maritime Services to file a Complaint before the Commission and, thereby, sue the State of South Carolina for damages and injunctive relief. The Eleventh Amendment is not limited to the Judicial Branch — it encompasses the entire Federal Government. It would be a remarkable result to allow Congress to create a cause of action before a quasi-judicial administrative tribunal where the Constitution expressly prohibits bringing the same cause of action under the "Judicial power of the United States." Ultimately, the Commission must rely on the courts to enforce its orders and, therefore, any Commission reparations order would therefore be unenforceable. [47] Thus, the SPA is immune from this suit for damages filed by Maritime Services.

VI. Maritime Services has not met the conditions precedent to operating and berthing a vessel and has not shown that it is disposed to comply with the Commission's rules.

Parties that invoke the Commission's jurisdiction must themselves comply with applicable legal requirements. First, Commission Rule 62 requires a complaint to be verified to give the Commission reasonable assurance that a principal of the party has reviewed the allegations and believes them to be true.[48] The Complaint in this docket is unverified. This failure alone is sufficient to support dismissal.

In addition, Complainant has apparently failed to fulfill two conditions precedent to arranging, advertising, offering, or providing passage, obtaining berthing space, or operating its vessel. First, the FMC has not issued Complainant a Certificate of Financial Responsibility

[47] 46 U.S.C. app. § 1714.
[48] 46 C.F.R. § 502.62.

(Performance). Failure to attain a Certificate is a *per se* bar to arranging to carry passengers at U.S. ports.[49] Second, the Coast Guard has apparently not issued Complainant an Oil Pollution Certificate to ensure it will be financially responsible for water pollution.[50] The SPA has investigated and found no evidence that Complainant possesses either certificate. Without these certificates, Complainant cannot lawfully participate in its proposed activities. Because it cannot lawfully operate its vessel, Maritime Services cannot demonstrate a realistic danger of sustaining any injury as a result of the SPA's actions. Moreover, the Commission should not allocate its sparse resources in a case where the alleged harm is conjectural and hypothetical at best.

VII. The Complaint wrongfully asks the Commission to review a decision made under recognized state police power. The Presiding Officer should dismiss the Complaint.

The SPA respectfully requests the Presiding Officer to dismiss the Complaint under Rule 73,[51] since it raises no issues cognizable under the Shipping Act of 1984. Maritime Services has failed to meet its burden of proving that its effort to invoke the Commission's jurisdiction is proper. The SPA also moves the Presiding Officer to hold that the SPA is immune from this suit under the Eleventh Amendment of the U.S. Constitution because the SPA is a state agency and this matter is before a federal tribunal. Finally, the SPA moves the Presiding Officer to dismiss the Complaint because Maritime Services has not met the conditions precedent to operating and berthing a vessel.

[49] 46 C.F.R. §§ 540.3, 540.22.
[50] 33 C.F.R. § 138.12.
[51] 46 C.F.R. § 502.73.

Respectfully submitted,

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[Certificate of Service Omitted in Printing]

[Exhibits to the Motion to Dismiss Consisting of the Following were Omitted in Printing:

A. Code of Laws of South Carolina 1976 Annotated, sections:

16-19-10. Setting up lotteries.

16-19-20. Adventuring in lotteries.

16-19-30. Selling lottery tickets.

16-19-40. Unlawful games and betting.

16-19-50. Keeping unlawful gaming tables.

16-19-60. Legality of coin-operated nonpayout machines with free play feature.

16-19-120. Officers shall destroy gambling devices after confiscation.

16-19-130. Betting, pool selling, bookmaking and the like are prohibited.

12-21-2710. Types of machines and devices prohibited by law; penalties.

12-21-2720. License for coin-operated devices or machines; license tax; maximum municipal license charges; special one-time interim fees; game located on watercraft or vessel. (Appearing in the joint appendix filed in the court of appeals at pages 51-60).

B. South Carolina Constitution: Article XVII, "Miscellaneous Matters"(Appearing in the joint appendix filed in the court of appeals at pages 61-66).

C. Ordinance of the Code of the City of Charleston, South Carolina, subsection 21-179, "Gambling devices on vessels prohibited;" Ordinance of the Code of the City of Charleston, South Carolina, subsection 21-176(c), "Prohibition on the operation of any gaming vessel from facilities within the corporate limits of the city" (Appearing in the joint appendix filed in the court of appeals at pages 67-71).

D. United States Code Annotated, Title 15, Commerce and Trade, Chapter 24, Transportation of Gambling Devices, section 1175 (Appearing in the joint appendix filed in the court of appeals at pages 72-75).

E. *Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999) (Appearing in the joint appendix filed in the court of appeals at pages 76-83).

F. Letter from George M. Earle, counsel for South Carolina Maritime Services, to Norman Kline, Administrative Law Judge, Federal Maritime Commission, dated November 11, 1999 (Appearing in the joint appendix filed in the court of appeals at page 84).]

BEFORE THE FEDERAL MARITIME COMMISSION

[Filed Dec. 6, 1999]

SOUTH CAROLINA MARITIME SERVICES, INC.,
Complainant,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

NOW COMES South Carolina Maritime Services, Inc. ("Maritime Services"), as Complainant, and files this Response to the Motion to Dismiss of South Carolina State Ports Authority ("Ports Authority"), Respondent herein.

INTRODUCTION

The Ports Authority has engaged in a pattern of discriminatory practices in its role as marine terminal operator in the Port of Charleston, South Carolina, and Maritime Services filed a complaint seeking a Federal Maritime Commission ("Commission") investigation of the Ports Authority's practices, reparations for past discrimination, and injunctive relief (See Complaint of Maritime Services). The Ports Authority has unreasonably prohibited Maritime Services from using its berthing facilities for its vessel, the M/V TROPICANA, a/k/a the M/V TROPIC SEA, based on the fact that Maritime Services intends to operate "cruises to nowhere" on the vessel. Yet, the Ports Authority has permitted and continues to permit vessels operated by

Carnival Cruise Line ("Carnival") to carry out "cruise to nowhere" operations from the Port of Charleston.

In its Motion to Dismiss, the Ports Authority cites several South Carolina statutes as support for its claim that these "cruise to nowhere" activities are prohibited, despite the fact that at least one South Carolina court has held these statutes to be inapplicable to such activities. (See Order of the Honorable A. Victor Rawl, Chief Administrative Judge, Ninth Judicial Circuit, in *Stardancer Casino, Inc. v. Stewart*, Calendar No. 99-CP-10-2671, Court of Common Pleas, County of Charleston, State of South Carolina, attached herewith as Exhibit "A"). The Ports Authority then attempts to shield itself from action by the Federal Maritime Commission into its actions by claiming that the Commission is not vested with the authority to investigate this controversy and by claiming that the Ports Authority is immune from any Commission action under the Eleventh Amendment of the United States Constitution. Lastly, the Ports Authority claims that Maritime Services has not satisfied conditions precedent to common carrier status, thereby precluding the Commission from hearing this action.

The Shipping Act of 1984 clearly vests the Commission with authority to investigate and direct payment of reparations, as well as authority to subsequently file suit for injunctive relief against marine terminal operators - such as the Ports Authority - who fail to abide by the provisions of the Shipping Act. Moreover, actions taken by the Commission against the Ports Authority are not subject to the Eleventh Amendment. Therefore, the Commission is fully authorized to hear this matter.

ARGUMENT AND CITATION OF AUTHORITY

* * * * *

[Sections I - IV Omitted in Printing]

* * * * *

V. The Ports Authority does not enjoy Eleventh Amendment immunity in suits by federal regulatory agencies

The Federal Maritime Commission is authorized to pursue actions against state agencies. Maritime Services has requested that the Commission seek an injunction in this case. As the Ports Authority concedes in its Motion to Dismiss, the Supreme Court has upheld the power of a federal regulatory body to investigate a state agency's practices. *California v. United States*, 320 U.S. 577 (1944). The Ports Authority cites caselaw for the proposition that States are immune from suit in federal district court; however, the Ports Authority cites no authority for the proposition that states are immune from actions by federal regulatory bodies.

The Federal Maritime Commission's powers do not end at the investigative phase, however, for the Commission is empowered to bring suit in Federal District Court against the Ports Authority, despite its status as a state agency. State port agencies do not enjoy immunity from actions by the Federal Maritime Commission in Federal District Court. *Maryland Port Admin. v. Fed. Maritime Comm'n*, 164 F.3d 624, 1998 WL 716035 (4th Cir. 1998). (Attached herewith as Exhibit "E"). In the *Maryland Port Admin.* case, the Federal Maritime Commission brought suit in Federal District Court against the state port agency in Maryland for discriminatory practices in its preferences for one carrier over another in the provision of port services at its terminal. *Id.* at *1. The jurisdiction of the Federal Maritime Commission in prosecuting the suit was explicitly upheld under 46 U.S.C. app 1713. *Id.* at *3. The Court of Appeals implicitly upheld the district court's jurisdiction over the Federal Maritime Commission's action against the state ports authority of Maryland when it affirmed in part the opinion of the district court and remanded the case for reconsideration by the district court. *Id.* at *6.

Maritime Services submits that the Ports Authority consented to suit before the Commission district court by participating in an industry regulated by the Shipping Act, in which Congress explicitly stated that participating parties would be subject to suit in federal district court. By engaging in operations as a marine terminal operator, the Ports Authority is obligated to abide by the provisions of the Shipping Act of 1984. The Shipping Act provides that the Commission may bring suit in a district court of the United States to enjoin conduct in violation of the Shipping Act 46 U.S.C. app. 1710(h)(1). This is clear, explicit language subjecting any party participating in the activities regulated by the Shipping Act to suit in federal district courts. Through its operation of a marine terminal under the provisions of the Shipping Act, the Ports Authority consented to suit in federal district court, and thus any suit brought by the Commission is authorized.

* * * * *

[Section VI Omitted in Printing]

* * * * *

CONCLUSION

The Federal Maritime Commission is fully authorized to entertain this action pursuant to the powers granted to it under the Shipping Act. The Ports Authority's discriminatory practice of preferring certain "cruise to nowhere" operations over others is a violation of 46 U.S.C. 1709(b)(10) and 1709(d)(4). The Commission is therefore authorized to pursue an investigation, direct payment of reparations and file suit in federal district court under 46 U.S.C. 1710(h). The fact that the Ports Authority is a state agency is immaterial in this case, because state entities do not enjoy Eleventh Amendment immunity from actions by federal regulatory bodies. For the foregoing reasons, the Complainant requests that the Commission deny the

Respondent's Motion to Dismiss.

Respectfully submitted this 4 day of December, 1999.

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[Exhibits to the Response Consisting of the Following were Omitted in Printing:

A. *Stardancer Casino, Inc. v. Stewart*, Court of Common Pleas, County of Charleston, State of South Carolina, Case No. 99-CP-10-2671, Order on Declaratory Judgment, dated October 8, 1999 (Appearing in the joint appendix filed in the court of appeals at pages 96-110).

B. Photocopied advertisements for Carnival Cruise Lines, including "1-Night 'Nowhere' cruise" from Charleston, South Carolina (Appearing in the joint appendix filed in the court of appeals at pages 111-114).

C. *Reed v. San Francisco*, 10 Cal. App. 4th 572, 12 Cal. Rptr.2d 647 (Court of Appeal, First District, Division 5, California, 1992); *New York Shipping Association v. Federal Maritime Commission*, 854 F.2d 1338 (D.C. Cir. 1988) (Appearing in the joint appendix filed in the court of appeals at pages 115-156).

D. Vessel Certificate of Financial Responsibility (Water Pollution) No. 839547-13, for the vessel TROPICANA, issued by the United States Coast Guard (Appearing in the joint appendix filed in the court of

appeals at pages 157-158).

E. *Maryland Port Administration v. Federal Maritime Commission*, 1998 WL 716035 (4th Cir. 1998) (Appearing in the joint appendix filed in the court of appeals at pages 159-164).

F. Verification of Frank Guarino, President of South Carolina Maritime Services, Inc., dated October 28, 1999 (Appearing in the joint appendix filed in the court of appeals at pages 165-166).]

[Certificate of Service Omitted in Printing]

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Supreme Court, U.S.
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No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL MARITIME COMMISSION

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58 pp

I

QUESTION PRESENTED

Whether the Eleventh Amendment to the United States Constitution or principles of state sovereign immunity from suit preclude Congress from requiring the Federal Maritime Commission to adjudicate a private person's complaint that a state-run port has violated the Shipping Act of 1984.

TABLE OF CONTENTS

	Page
Question presented	I
Table of authorities	V
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Statement	1
A. The adjudication of complaints under the Shipping Act	2
B. The complaint filed against the South Carolina State Ports Authority in this case	4
Summary of argument	8
Argument	10
A. Statutory background	12
1. Federal regulation of marine terminals	12
2. The origin of the administrative adjudication of complaints in the regulation of oceanborne transportation	15
B. The Eleventh Amendment and principles of state sovereign immunity from suit apply exclusively to the exercise of judicial power in a lawsuit against an unconsenting State	17
1. The Federal Maritime Commission does not exercise the judicial power of the United States	20
2. An administrative adjudication by the Federal Maritime Commission is not a suit in law or equity	23
C. Principles of state sovereign immunity from suit are defined and constrained by the Constitution's history and structure	25

1. State sovereign immunity from administrative adjudications cannot be inferred from the history and structure of the Constitution 25
2. *Alden v. Maine* does not suggest that the States are immune from federal administrative adjudications 27
3. The Founders' understanding of the importance of maritime commerce is further evidence that the States do not enjoy sovereign immunity from administrative adjudications before the Federal Maritime Commission 29
D. The public rights doctrine protects the States' sovereign immunity from encroachment by limiting the circumstances under which Congress may authorize non-Article III tribunals to adjudicate complaints 34
1. The right to file a complaint under the Shipping Act is a public right 35
2. The public rights doctrine would not permit Congress to undermine the States' traditional immunity from suit 38
Conclusion 41
Appendix 1a

TABLE OF AUTHORITIES

Page

Cases:

Alden v. Maine, 527 U.S. 706 (1999) 9, 19, 23, 27, 28, 29, 30
American Export-Isbrandtsen Line, Inc. v. Federal Maritime Comm'n, 444 F.2d 824 (D.C. Cir. 1970) 37
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 19
Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 19
California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) 18
California v. United States, 320 U.S. 577 (1944) .. 10, 14, 27, 33, 37
Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984) 22
Cohens v. Virginia, 6 Wheat. 264 (1821) 23
College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 19
Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 10, 34, 35, 36, 37, 38, 39
Consolo v. Federal Maritime Comm'n, 383 U.S. 607 (1966) 22
Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299 (1852) 32
Crowell v. Benson, 285 U.S. 22 (1932) 40
D.L. Piazza Co. v. West Coast Line, Inc., 210 F.2d 947 (2nd Cir.), cert. denied, 348 U.S. 839 (1954) 24
Delaware Dep't of Health & Social Serv. v. United States Dep't of Educ., 772 F.2d 1123 (3rd Cir. 1985).. 11

Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981) 11

Far East Conf. v. United States, 342 U.S. 570 (1952) .. 14

Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991) 8, 20, 21, 22

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 10, 29

Gibbons v. Ogden, 9 Wheat. 1 (1824) 32

Government of Guam v. American President Lines, 28 F.3d 142 (D.C. Cir. 1994) 24

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 34, 39, 40

Hans v. Louisiana, 134 U.S. 1 (1890) 17, 30

Howlett v. Rose, 496 U.S. 356 (1990) 26, 29

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997). 23

International Union v. Bagwell, 512 U.S. 821 (1994) 21-22

McCulloch v. Maryland, 4 Wheat. 316 (1819) 27

Munn v. Illinois, 94 U.S. 113 (1876) 37

Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272 (1855) 337 U.S. 582 (1949) 40

National Insurance Co. v. Tidewater Co., 337 U.S. 582 (1949) 34

Nevada v. Hall, 440 U.S. 410 (1979) 9, 25, 26, 29

New York, Ex Parte, 256 U.S. 490 (1921) .. 18, 23, 29

Northern Pipeline Construction Co v. Marathon Pipeline Co., 458 U.S. 50 (1982) 34, 38, 40

Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929) 20

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 19, 38-39

Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Comm'n, 838 F.2d 536 (D.C. Cir. 1988) 13, 16, 33

Port Utilities Comm'n of Charleston, S.C. v. The Carolina Co., 1 U.S.S.B. 61 (1925) 33

Premo v. Martin, 119 F.3d 764 (9th Cir. 1997), cert. denied, 522 U.S. 1147 (1998) 11

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 18

Puerto Rico Ports Auth. v. Federal Maritime Comm'n, 919 F.2d 799 (1st Cir. 1990) 16

Reno v. Condon, 528 U.S. 141 (2000) 10

Ristow v. South Carolina Ports Authority, 58 F.3d 1051 (4th Cir. 1995) 5

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 7, 19, 25

South Carolina State Ports Auth. v. Georgia Ports Auth., FMC Docket No. 84-5, 49 Fed. Reg. 7657 (March 1, 1984) 33

Tennessee Dep't of Human Serv. v. United States Dep't of Educ., 979 F.2d 1162 (6th Cir. 1992) 11

Thomas v. Union Carbide, 473 U.S. 568 (1985) 34, 35, 38, 40

United States v. American Union Transp., Inc., 327 U.S. 437 (1946) 33

United States v. Hudson, 7 Cranch 32 (1812) 22

United States v. Locke, 529 U.S. 89 (2000) 32, 33

United States v. Lopez, 514 U.S. 549 (1995) 32

United States v. Mead, 533 U.S. 218 (2001) 22

United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932) 15

United States Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 27

Upshur County v. Rich, 135 U.S. 467 (1890) 23
Constitution, statutes and regulations:
U.S. Const.:
Art. I, sec. 9, cl. 6 (Port Preference Clause) ... 32
Art. II, sec. 2, cl. 2 (Appointments Clause) 20
Art. III ..... *passim*
Sec. 2, cl. 1 18
Amend. XI ..... *passim*
Exec. Order No. 6166, sec. 12 (1933) 15
Hobbs Administrative Orders Judicial Review Act,
28 U.S.C. 2341 *et seq* 3
28 U.S.C. 2342 ..... 4, 38
28 U.S.C. 2342(3) 7
28 U.S.C. 2348 22
28 U.S.C. 2350(a) 1
Interstate Commerce Act, 24 Stat. 379 (1887) ... 15, 36
Merchant Marine Act of 1936, 49 Stat. 1985 (1936).. 15
Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902 (1998) 36
Reorg. Plan No. 7 of 1961, 75 Stat. 840 15
Reorg. Plan No. 21 of 1950, 64 Stat. 1273 15
Shipping Act of 1916, 39 Stat. 728 (1916) . 12, 13, 14, 15, 16
Shipping Act of 1984, 46 U.S.C. app. 1701 *et seq* . 2, 10, 16
46 U.S.C. app. 1701 ..... 25, 35
46 U.S.C. app. 1702(6) 2
46 U.S.C. app. 1702(14) 2, 16
46 U.S.C. app. 1704 21
46 U.S.C. app. 1705 21
46 U.S.C. app. 1706 21

46 U.S.C. app. 1707 21
46 U.S.C. app. 1708 21
46 U.S.C. app. 1709 ..... 2, 35
46 U.S.C. app. 1709(b)(10) 4, 36
46 U.S.C. app. 1709(d)(3) 4
46 U.S.C. app. 1709(d)(4) 4, 25, 36
46 U.S.C. app. 1710(a) 2, 16
46 U.S.C. app. 1710(b) 2, 3
46 U.S.C. app. 1710(c) 2
46 U.S.C. app. 1710(d) 2
46 U.S.C. app. 1710(f) 3
46 U.S.C. app. 1710(g) 3
46 U.S.C. app. 1711(a)(1) 3
46 U.S.C. app. 1711(a)(2) 3
46 U.S.C. app. 1712(e) 38
46 U.S.C. app. 1713 4
46 U.S.C. app. 1713(a) 2
46 U.S.C. app. 1713(c) 3, 22, 38
46 U.S.C. app. 1716 21
46 C.F.R. Part 502, Rules of Practice and Procedure 3
46 C.F.R. 502.146(a) 3
46 C.F.R. 502.227(a)(6) 4
46 C.F.R. 502.227(d) 3
28 U.S.C. 1254(1) 1
Miscellaneous:
Debates in the State Conventions on the Adoption of the Constitution (J. Elliot ed. 1888) 31

The Federalist Papers (C. Rossiter ed. 1961):
No. 22 (A. Hamilton) 31
No. 32 (A. Hamilton) 30, 31
No. 42 (J. Madison) 30, 31
No. 81 (A. Hamilton) 17, 18, 30
F. Frankfurter and J. Landis, The Business of the Supreme Court (1927) 30
Paul Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L. J. 233 (1989) 39-40
House Comm. on Merchant Marine and Fisheries, Report on Steamship Agreements, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914) 13
H.R. Rep. No. 98-53, 98th Cong., 1st Sess., pt. 1 (1983), reprinted in 1984 USCCAN 167 16
Records of the Federal Convention (M. Farrand ed. 1966) 30, 31
53 Cong. Rec. 8276 (May 18, 1916) 13, 14

BRIEF FOR THE FEDERAL MARITIME COMMISSION

OPINIONS BELOW

The opinion of the court of appeals is reported at 243 F.3d 165 and is reproduced as Appendix A in the separately-bound appendix to the petition for a writ of certiorari ("Pet. App.") at 1a-25a. The opinion of the Federal Maritime Commission is unofficially reported at 28 Shipping Reg. (P & F) 1385 and is reproduced as Appendix B at Pet. App. 27a-39a. The opinion of the administrative law judge is unofficially reported at 28 Shipping Reg. (P & F) 1307 and is reproduced as Appendix C at Pet. App. 40a-62a.

JURISDICTION

The court of appeals entered its judgment on March 12, 2001. On May 21, 2001, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 10, 2001, and the Commission's petition was filed on that date. The petition was granted on October 15, 2001. 122 S.Ct. 392. The jurisdiction of this Court is invoked under 28 U.S.C. 2350(a) and 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution is reproduced in the appendix to this brief. App., *infra*, 1a. Sections 3, 10, 11, 12, 13 and 14 of the Shipping Act of 1984 are also reproduced in relevant part in the appendix to the brief. App., *infra*, 1a-7a.

STATEMENT

Federal regulation of oceanborne transportation in the foreign commerce of the United States is governed by the

Shipping Act of 1984 (Shipping Act), 46 U.S.C. app. 1701 *et seq.* The Federal Maritime Commission (Commission) is the agency responsible for administering the statute. The Shipping Act regulates several categories of persons, including common carriers of passengers by water in international commerce, as well as persons operating marine terminals - often publicly-operated ports - in connection with common carriers. 46 U.S.C. app. 1702(6) & (14). The Shipping Act forbids certain conduct that Congress has found to be detrimental to competition and efficiency in the shipping industry. 46 U.S.C. app. 1709 (prohibited acts).

A. The adjudication of complaints under the Shipping Act

The Shipping Act includes a procedure by which "any person" may file a complaint with the Commission alleging a statutory violation and seeking monetary reparations and other forms of relief. 46 U.S.C. app. 1710(a). The "person named" in the complaint (the respondent) must either settle the complaint or file a written answer to it with the Commission; unless the respondent settles the complaint, the Commission is required to conduct an adjudication of the merits of the complaint and to issue an appropriate order. 46 U.S.C. app. 1710(b). The Commission is also authorized to initiate investigations of possible violations of the Shipping Act on its own motion. 46 U.S.C. app. 1710(c).

The Shipping Act imposes certain requirements on the Commission's adjudication of a complaint. The Commission must: set a date on or before which its decision will be issued within ten days of the filing of the complaint (46 U.S.C. app. 1710(d)); provide an "opportunity for hearing" before issuing an order on the merits of the complaint (46 U.S.C. app. 1713(a)); and permit the parties to the adjudication to utilize "depositions, written interrogatories, and discovery procedures * * * under rules and regulations issued by the Commission that, to the extent practicable, shall be in conformity with the rules applicable in civil

proceedings in the district courts of the United States." 46 U.S.C. app. 1711(a)(1).[1] During the adjudication, the Commission may subpoena witnesses and compel the production of documents and other evidence (46 U.S.C. app. 1711(a)(2)); in the event of noncompliance, Commission subpoenas are enforceable by order of a federal district court. 46 U.S.C. app. 1713(c). When the Commission completes its adjudication of a complaint, the Shipping Act requires the agency to issue a written report stating its conclusions, decisions, findings of fact, and order; to provide copies of this report to the parties; and to publish the report for public information. 46 U.S.C. app. 1710(f). If the complaint is timely filed and the complainant proves a violation of the statute and actual injury arising from that violation, the Shipping Act provides that the Commission shall direct the payment of monetary reparations and attorney's fees to the complainant. 46 U.S.C. app. 1710(g). The Commission may also issue prospective relief, such as a cease and desist order. 46 U.S.C. app. 1710(b). All of these statutory requirements, apart from the section governing awards of monetary reparations and attorney's fees, apply equally to the adjudication of a Commission-initiated investigation.

The Commission has enacted procedural regulations to implement the statutory provisions governing its adjudication of complaints and investigations. 46 C.F.R. Part 502, Rules of Practice and Procedure. The Commission assigns proceedings to its administrative law judges (ALJs) in the first instance. 46 C.F.R. 502.146(a). The Commission, upon the request of a party or on its own motion, may review an ALJ's initial decision. 46 C.F.R. 502.227(d). When the Commission reviews an initial decision, it retains complete

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[1] The Hobbs Administrative Orders Judicial Review Act (Hobbs Act), 28 U.S.C. 2341 *et seq.*, which governs appellate review of the Commission's orders, sets forth a presumption that the complaint procedure will result in the creation of an administrative record. See 28 U.S.C. 2346.

authority over the matter and is not required to show any deference to the ALJ's opinion. 46 C.F.R. 502.227(a)(6).

The courts of appeals have exclusive jurisdiction to review the merits of Commission orders. 28 U.S.C. 2342. In the event of noncompliance with a Commission order, enforcement may be sought in a federal district court. 46 U.S.C. app. 1713. If the order contains an award of monetary reparations, the party that received the award may initiate the enforcement proceeding; orders granting other forms of relief may be enforced in district court either by the Attorney General at the Commission's request or by a private party. *Ibid.*

B. The complaint filed against the South Carolina State Ports Authority in this case

South Carolina Maritime Services, Inc. (Maritime Services), a South Carolina corporation, filed a complaint with the Commission in which it alleged that the South Carolina State Ports Authority (SCSPA), acting as a marine terminal operator, had violated sections 10(b)(10) and 10(d)(4) of the Shipping Act, 46 U.S.C. app. 1709(b)(10) and (d)(4).[2] JA 7. These sections prohibit marine terminal operators from unreasonably refusing to deal, from conferring any undue or unreasonable preference or advantage, and from imposing any undue or unreasonable prejudice or disadvantage. Maritime Services averred that SCSPA had violated the Shipping Act by refusing to permit Maritime Services' cruise ship, the M/V TROPIC SEA, to berth at SCSPA's facilities in Charleston, South Carolina. *Id.* at 14.

Maritime Services wished to offer passenger cruises from the Port of Charleston, some to "nowhere" and others to the Bahamas. JA 9. Gambling would be available to

[2] The proscription in section 10(b)(10) refers solely to common carriers, but is made applicable to marine terminal operators by section 10(d)(3), 46 U.S.C. app. 1709(d)(3).

passengers while the M/V TROPIC SEA was in international waters. *Ibid.* On five occasions, Maritime Services asked for berthing space and was denied it by SCSPA. *Id.* at 10-12. Maritime Services filed its complaint with the Commission after the fifth request for berthing space was denied.

SCSPA attributed its rejection of Maritime Services' requests to a policy of refusing access to vessels that promote gambling. JA 18-19. In the complaint, however, Maritime Services alleged that SCSPA *had* permitted a competitor, Carnival Cruise Lines, to use SCSPA's facilities at the Port of Charleston on numerous occasions for cruises to "nowhere" on which gambling was available. Maritime Services asserted that SCSPA's uneven application of its stated policy towards gambling vessels was violative of the Shipping Act because it "constitutes an unreasonable refusal to deal or negotiate" and "gives undue and unreasonable preference to cruise lines such as Carnival and imposes an undue and unreasonable prejudice or disadvantage with respect to Maritime Services." *Id.* at 14-15. Maritime Services asked the Commission to award it monetary reparations for actual injuries sustained as a result of the denials of berthing space, as well as interest and attorney's fees. *Id.* at 16. Maritime Services also asked the Commission to seek an injunction in district court against SCSPA, to order SCSPA to cease and desist from violating the Shipping Act, and to award any other just and proper relief. *Ibid.*

Maritime Services' complaint was assigned to an ALJ. SCSPA filed an answer to the complaint, denying that it had violated the Shipping Act; shortly thereafter, it filed a motion to dismiss. JA 18, 27. In the motion, SCSPA asserted that it is an arm of the State of South Carolina and that it enjoys sovereign immunity from private complaints filed with the Commission.[3] *Id.* at 41-44. The motion also raised numerous

[3] In *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir. 1995), the U.S. Court of Appeals for the Fourth Circuit determined that SCSPA is an arm of the State of South Carolina.

other issues, mostly addressed to a substantive defense of SCSPA's policies as well as Maritime Services' alleged failure to satisfy various federal requirements precedent to the lawful operation of a cruise vessel. *Id.* at 31-41, 44-45. Maritime Services filed a response opposing the motion, in which it argued that "state entities do not enjoy Eleventh Amendment immunity from actions by federal regulatory bodies." *Id.* at 52. The ALJ was not convinced by this argument, and accordingly granted SCSPA's motion. Pet. App. 39a-62a. The ALJ reasoned that the port's immunity from suit extends to proceedings before any forum, including federal administrative agencies, and concluded that this immunity prohibited the Commission from hearing Maritime Services' complaint. *Id.* at 59a-60a. The ALJ did not address the other issues raised in the motion to dismiss.

Reviewing the ALJ's opinion, the Commission reversed and held that the Eleventh Amendment and principles of state immunity from suit do not preclude administrative proceedings initiated by private complaint against state-run marine terminals. Pet. App. 27a-38a. The Commission observed that a sovereign immunity defense is relevant to lawsuits before courts, not to administrative adjudications before federal agencies. *Id.* at 33a. The Commission also noted that its jurisdiction over privately-filed complaints against state-run marine terminals is a crucial tool in fulfilling the agency's obligation to regulate oceanborne transportation in the Nation's foreign commerce. *Ibid.* Although it reversed the ALJ's decision, the Commission did not rule that SCSPA had violated the Shipping Act, did not award reparations to Maritime Services, and did not deny the entirety of SCSPA's motion to dismiss. Rather, the Commission remanded the case to the ALJ for a ruling on the various other issues SCSPA had raised in its motion. *Id.* at 37a-38a.

SCSPA filed a timely petition for review in the United States Court of Appeals for the Fourth Circuit pursuant to

the Hobbs Act.[4] It also filed a motion with the ALJ seeking a stay of the continuing adjudication of Maritime Services' complaint, claiming that it would "suffer irreparable harm if forced to proceed in violation of its constitutional rights." Ct. App. JA 218. The ALJ granted the stay, and the case was held in abeyance pending a resolution of the appeal.

The court of appeals overturned the Commission's order and directed the Commission to dismiss Maritime Services' complaint. Pet. App. 1a-25a. The court concluded that Congress had exceeded its authority when it required the Commission to adjudicate complaints filed by private persons against state-run marine terminals. *Id.* at 25a. Examining the private complaint procedure established in the Shipping Act, the court decided that the Eleventh Amendment and principles of state immunity from suit preclude Congress from "authoriz[ing] private parties to haul unconsenting states before the adjudicative apparatus of federal agencies and commissions." *Ibid.* The court of appeals disagreed with the Commission's argument that the exercise of adjudicatory authority by the agency constitutes executive power not limited by immunity principles, and determined that "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states" is "invalid * * * whether the forum be a state court, a federal court, or a federal administrative agency." *Id.* at 13a. The court also rejected the Commission's contention that the federal interest in the uniform regulation of maritime commerce demonstrates that sovereign immunity should not apply to proceedings affecting that commerce. *Id.* at 22a-24a.

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[4] The Hobbs Act ordinarily permits appellate review of "final" agency orders. 28 U.S.C. 2342(3). The collateral order doctrine, however, supplies an exception to the finality requirement and allows immediate appellate review of a denial of Eleventh Amendment immunity. See *Seminole Tribe v. Florida*, 517 U.S. 44, 52 (1996).

SUMMARY OF ARGUMENT

In the Shipping Act of 1984 (Shipping Act), Congress has provided for the regulation of oceanborne transportation in the foreign commerce of the United States; the Federal Maritime Commission (Commission) is the agency charged with administering the statute. The Shipping Act regulates marine terminals, which are often publicly-operated ports, and proscribes certain conduct Congress has determined to be harmful to competition and efficiency in the shipping industry. The Act authorizes any person to file a complaint with the Commission alleging a violation of the statute and seeking monetary reparations and other forms of relief, including prospective relief. The question presented is whether the Eleventh Amendment and principles of state sovereign immunity from suit preclude Congress from requiring the Commission to adjudicate a private person's complaint that a state-run marine terminal has violated the Shipping Act.

Because the Eleventh Amendment and sovereign immunity principles confirm the States' immunity from constitutionally inappropriate exercises of *judicial* power, they do not bar the Commission's adjudication of a complaint against a state-run marine terminal. According to the standards set forth in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), the Commission does not possess the major indicia of judicial power. First, the Commission does not have an exclusively judicial role; rather, it is charged with numerous regulatory responsibilities including but not limited to the adjudication of complaints. Second, the Commission does not hold the authority to punish contempt, and its orders are enforceable only in federal district court. Third, the Commission's orders are reviewed by the courts of appeals under the standards applicable to administrative agency decisionmaking, rather than the standards of review applied to district court rulings. Moreover, the filing of a complaint before the Commission is not a "suit in law or equity," U.S. Const. amend. XI, but

instead is a form of executive enforcement of the law. The Commission's adjudication of complaints is an integral part of its administration of the Shipping Act, and through the adjudicative process the agency creates subordinate policies to effectuate the Act's fundamental policies.

The Court has found that principles of sovereign immunity are constrained by both the Constitution's structure and its historical background. In *Nevada v. Hall*, 440 U.S. 410, 419, 421 (1979), the Court ruled that a State's claim of immunity from suit in the courts of a sister State could not be sustained, because "the need for constitutional protection against that contingency was not discussed" by the Founders, and the Constitution does not "provide any basis, explicit or implicit, for the Court to" find such an immunity. A sovereign immunity defense must be supported by evidence in either constitutional history or constitutional design, and in this case, there is no evidence of state immunity from Executive Branch regulatory authority.

Alden v. Maine, 527 U.S. 706 (1999), does not lead to a contrary conclusion. In *Alden* the Court found that prior to the ratification of the Constitution, the States had enjoyed a traditional immunity from suit in their own courts; the Court determined that the Constitution did not require the States to surrender this immunity. The holding in *Alden* does not, however, establish a free-floating state immunity from any exercise of federal authority; rather, it reflects the Founders' understanding that the States would continue to enjoy their *traditional* immunity from suit in the courts of their own creation. Moreover, the Founders would not have countenanced a claim of state immunity from any aspect of the federal authority to regulate maritime commerce. The authority to ensure national uniformity in the administration of maritime commerce was viewed by the Founders as a fundamental component of the Federal Government's powers.

The result urged by the Commission in this case would not erode the States' immunity. The right to file a complaint

with the Commission is a public right, created by Congress to ensure the efficient administration of the Shipping Act, and adequate judicial review of the Commission's decisions is available in the courts of appeals. The public rights doctrine limits Congress' ability to replace traditional causes of action with agency adjudications, and precludes Congress from vesting in administrative agencies the authority to adjudicate purely private rights. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). By restricting the circumstances under which Congress may authorize administrative agencies to adjudicate complaints, the public rights doctrine protects from erosion both the judicial power in Article III and the States' immunity from that power.

ARGUMENT

Federal regulation of oceanborne transportation in the foreign commerce of the United States is governed by the Shipping Act of 1984 (Shipping Act), 46 U.S.C. app. 1701 *et seq.* The Federal Maritime Commission (Commission) is the agency responsible for administering the statute. Congress provided in the Shipping Act that any person may file a complaint with the Commission alleging violations of the Act, and may seek monetary reparations and other forms of relief. Congress further provided that all marine terminal operators engaged in the business activities regulated by the Shipping Act are subject to its provisions. As explained below, *infra* at 14, the validity of the Shipping Act as applied to state-run marine terminals was resolved in *California v. United States*, 320 U.S. 577 (1944), and is not at issue here, nor is there any suggestion that Congress lacks the authority to regulate state entities. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Reno v. Condon*, 528 U.S. 141 (2000). Moreover, the South Carolina State Ports Authority (SCSPA) has conceded (Br. in Opp. 4-5) that the Commission retains the authority to regulate its activities generally. The complaint in this case was properly filed, and Congress clearly expected the Commission to adjudicate it and cases like it.

The question presented is whether the Eleventh Amendment or principles of state sovereign immunity preclude Congress from requiring the Commission to adjudicate a privately-filed complaint against a state-run marine terminal. The courts of appeals have generally found the Eleventh Amendment inapplicable to proceedings before administrative agencies that do not exercise judicial power. See *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997), cert. denied, 522 U.S. 1147 (1998); *Tennessee Dep't of Human Serv. v. United States Dep't of Educ.*, 979 F.2d 1162 (6th Cir. 1992); *Delaware Dep't of Health & Social Serv. v. United States Dep't of Educ.*, 772 F.2d 1123 (3rd Cir. 1985) (in dictum); *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981).

In this case, however, the court of appeals ruled that Congress exceeded its authority when it required the Commission to adjudicate privately-filed complaints against state-run marine terminals, and ordered the Commission to dismiss Maritime Services' complaint before the agency could determine whether SCSPA had violated the Shipping Act. The practical effect of the court of appeals' decision is to prevent the Commission from administering the Shipping Act as Congress designed it by forbidding the agency from hearing privately-initiated complaint proceedings against state-run marine terminals, unless they consent to such regulation. In the agency order overturned by the court of appeals, the Commission had noted that its "jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports. Accordingly, the Commission has in the past rebuffed attempts to restrict its jurisdiction over public port authorities." Pet. App. 33a. The court of appeals' decision would prevent the Commission from relying on private complaints as a regulatory tool to ensure that state-run marine terminals comply with the Shipping Act's requirements.

The court of appeals' decision should be reversed. Congress, acting pursuant to its long-recognized power to vest *executive* officers with the capacity to adjudicate complaints, has determined that administrative adjudications are an important component of the regulation of oceanborne transportation in the foreign commerce of the United States. The Eleventh Amendment and principles of sovereign immunity are properly applied to proceedings before tribunals exercising *judicial* power. The constitutional design does not contemplate state sovereign immunity from executive authority, and consequently, there is no basis upon which to find SCSPA immune from the Commission's adjudication of Maritime Services' complaint. Moreover, the historical significance of federal power over the regulation of maritime commerce, and the requirement of uniformity in the regulation of that commerce embedded in the Constitution, confirm that state immunity principles do not apply to proceedings before the Commission. Finally, there is no danger that the States' immunity from suit will be undercut through the use of administrative adjudications, because the public rights doctrine limits Congress' power to vest the adjudication of complaints in non-Article III tribunals. This limitation protects from erosion not only the Article III judicial power itself, but also the States' immunity from that power.

A. STATUTORY BACKGROUND

1. Federal regulation of marine terminals

In order to bring the question presented by this case into proper focus, a brief description of Congress' determination to regulate marine terminals, including state-run marine terminals, is necessary. The Shipping Act of 1916 (1916 Act), 39 Stat. 728, the predecessor to the Shipping Act of 1984, established federal regulation of transportation by water in domestic and foreign commerce. The 1916 Act was designed to strengthen the American shipping industry by granting limited antitrust immunity to price-fixing activities

and by creating a regulatory program that sought to eliminate anticompetitive abuses. See House Comm. on Merchant Marine and Fisheries, Report on Steamship Agreements, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914). Ocean common carriers, conferences of such common carriers, marine terminal operators, and other maritime businesses were included in the 1916 Act's comprehensive regulatory program. 39 Stat. 728.

Marine terminal operators, under the nomenclature "other persons subject to this Act," 39 Stat. 728, were included in this statutory scheme because the 1916 Act's original sponsors believed that effective oversight required regulation not only of vessel operators but also of the port facilities that connected the vessels to the shippers they served. See generally *Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Comm'n*, 838 F.2d 536, 542-543 (D.C. Cir. 1988) (discussing Congress' rationale for the regulation of marine terminals under the 1916 Act). Debate in the House of Representatives over the 1916 Act illustrates that Congress intended the Act to apply to both public and private marine terminals, because the regulation of all terminals was seen as crucial to the success of the statutory scheme. Discussing a subsequently defeated amendment that would have removed terminal facilities from the 1916 Act's coverage, several Representatives referred to the publicly-owned ports at New York, Los Angeles, San Francisco, and Seattle, and inquired whether the statute was designed to remove control of those ports from local governments and place it in the Federal Government. 53 Cong. Rec. 8276 (May 18, 1916). In response, Representative Alexander, the 1916 Act's primary sponsor, expressed concern that certain terminals were exercising discrimination in the provision of lighterage charges (*i.e.*, fees for loading and unloading cargo). *Ibid.* He explained that the 1916 Act was drafted to prevent such discrimination, and noted that "not one of [the provisions regulating common carriers] would not have applied to these terminal facilities." *Ibid.*

Representative Alexander acknowledged that some terminals were operated by governments while others were privately operated. He clarified, however, that the 1916 Act would not wrest control of the facilities away from the local governments; rather, it would regulate them in the same manner as private terminals: "[i]f [public marine terminals] do exercise such discrimination, there is no reason why they should not be amenable to the law as well as a private person." *Ibid.*

Relying in part on Representative Alexander's statements, this Court in *California v. United States*, 320 U.S. 577 (1944), confirmed that the "plain purposes" of the 1916 Act required the inclusion of state-run marine terminals within the definition of "other person subject to" the statute.

> The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers. California and Oakland furnished precisely the facilities subject to regulation under the [Shipping] Act, and with so large a portion of the nation's dock facilities, as Congress knew (53 Cong.Rec. 8276), owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies. We need not rest on inference to avoid a construction that would have such dislocating consequences. The manager of the bill which became the Shipping Act of 1916, speaking on the floor of the House, left no doubt that the legislation was designed to prevent discrimination no less by public than by private owners. 53 Cong. Rec. 8276.

320 U.S. at 585-586. The Court also held in a subsequent case that another government entity - the United States in its capacity as a shipper - was a "person" subject to the 1916 Act's provisions. *Far East Conf. v. United States*, 342 U.S. 570 (1952).

2. The origin of the administrative adjudication of complaints in the regulation of oceanborne transportation

Marine terminals, including state-run terminals, were subject to private complaints under the 1916 Act. The complaint procedure in the 1916 Act was based upon section 13 of the Interstate Commerce Act (ICA), 24 Stat. 379, 383-384 (1887), under which "any person" could file a complaint with the Interstate Commerce Commission (ICC) against regulated common carriers, which were required either to settle such complaints or to answer them in writing. The ICC was charged with adjudicating filed complaints, and was required by the statute to issue a written report of its decision. *Id.* at 384. The ICA permitted complainants to seek monetary reparation for statutory violations that caused actual injury, and also authorized the ICC to initiate investigations on its own motion. *Ibid.* Section 9 of the ICA permitted the filing of a lawsuit in federal district court in the first instance alleging violations of the ICA as an alternative to filing a complaint with the ICC. *Id.* at 382.

Congress followed a similar approach to the one it had taken in the ICA when it enacted the 1916 Act, 39 Stat. 728. See *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 481 (1932) (comparing the ICA and the 1916 Act). Section 22 of the 1916 Act permitted "any person" to file a complaint alleging "any violation of this Act * * * and asking reparation for the injury, if any, caused thereby." 39 Stat. at 736. The respondent was required to settle the complaint or to answer it in writing, and the agency[5] was charged with

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[5] The United States Shipping Board was established by Congress to administer the 1916 Act. 39 Stat. 728, 729 (1916). The Shipping Board was succeeded by the United States Shipping Board Bureau, Exec. Order No. 6166, sec. 12 (1933), which was replaced in 1936 by the United States Maritime Commission. 49 Stat. 1985. The Federal Maritime Board replaced the U.S. Maritime Commission in 1950, Reorg. Plan No. 21 of 1950, 64 Stat. 1273, and the Federal Maritime Commission replaced the Board in 1961, Reorg. Plan No. 7 of 1961, 75 Stat. 840. The Commission is an independent regulatory agency.

adjudicating the merits of the complaint, providing a "full hearing," and issuing a written report of its decision. *Ibid.* Like the ICA, the 1916 Act drew a distinction between adjudications "upon a sworn complaint" and cases "instituted of [the agency's] own motion." *Ibid.* Unlike the ICA, however, the 1916 Act did not authorize the filing of a lawsuit in district court alleging violations of the statute; the agency's jurisdiction over complaints was exclusive. See *United States Navigation Co.*, 284 U.S. at 486 (explaining that the provision in the ICA permitting lawsuits in district court "finds no counterpart in the Shipping Act").

The 1916 Act governed the regulation of transportation in both domestic offshore and foreign commerce. Sixty-eight years after the 1916 Act was enacted, Congress repealed its provisions regarding foreign commerce and replaced them with a new regulatory scheme – the Shipping Act of 1984. Pub. L. 98-237, 98 Stat. 67, 46 U.S.C. app. 1701 *et seq.* See H.R. Rep. No. 98-53, 98th Cong., 1st Sess., pt. 1 at 3 (1983), reprinted in 1984 USCCAN 167, 168. However, the private complaint provisions of the 1916 Act were carried over with little change as section 11 of the Shipping Act of 1984, 46 U.S.C. app. 1710. See H.R. Rep. No. 98-53 at 36-37, 1984 USCCAN 167, 201-202. Congress continued to require the regulation of port facilities under the Shipping Act, but dropped the 1916 Act's term "other persons subject to this Act" and replaced it with the clearer designation "marine terminal operator." 46 U.S.C. app. 1702(14) (definition of marine terminal operator). See *Puerto Rico Ports Auth. v. Federal Maritime Comm'n*, 919 F.2d 799, 801 (1st Cir. 1990) ("The legislative history to the 1984 Act explains that the description of 'marine terminal operator' was taken directly from the 1916 Act's definition of 'other person subject to th[is] chapter'"). The provisions of the Shipping Act have generally been interpreted in a manner consistent with prior interpretations of the 1916 Act. See, *e.g.*, *Plaquemines*, 838 F.2d at 542 ("the intent behind, and prior interpretations of, the 1916 Act's provisions have continuing precedential force" under the Shipping Act of 1984).

B. THE ELEVENTH AMENDMENT AND PRINCIPLES OF STATE SOVEREIGN IMMUNITY FROM SUIT APPLY EXCLUSIVELY TO THE EXERCISE OF JUDICIAL POWER IN A LAWSUIT AGAINST AN UNCONSENTING STATE

The Shipping Act requires the Commission to oversee the application of statutory requirements and prohibitions to state-run marine terminals, and to adjudicate private complaints alleging that such terminals have failed to comply with those requirements and prohibitions. The court of appeals held that Congress exceeded its authority when it enabled private persons to initiate proceedings before the Commission by complaint. However, the inapplicability of the Eleventh Amendment to the Commission's adjudication of a complaint becomes clear when the type of power exercised by the Commission is considered.

The Eleventh Amendment forbids the extension of "[t]he Judicial power of the United States" to "any suit in law or equity" filed against an unconsenting State by a private litigant. Although state immunity from suit is broader than the literal text of the Eleventh Amendment, the seminal cases decided under the Amendment confirm its function as a prohibition against constitutionally inappropriate exercises of *judicial* power. In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court held that the Eleventh Amendment prevents federal courts from hearing suits against unconsenting States by the States' own citizens, although the Amendment speaks only of suits by "Citizens of another State." The Court grounded its ruling on the Founders' views of the proper reach of Article III, and focused in particular upon Alexander Hamilton's explanation in The Federalist No. 81 that the States would enjoy, as one of the "attributes of sovereignty," immunity from suits in federal court to which they did not consent, except when "there is a surrender of this immunity in the plan of the convention." 134 U.S. at 13 (quoting The

Federalist No. 81). The Court understood Hamilton's views to be directed precisely at "the obnoxious clause * * * which declared that 'the judicial power shall extend to all * * * controversies between a State and citizens of another State * * * and between a State and foreign states, citizens or subjects.'" *Ibid.* (quoting U.S. Const., Art. III, sec. 2, cl. 1). Based on this understanding, the Court concluded that "the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution *when establishing the judicial power of the United States.*" *Id.* at 15 (emphasis supplied). Similarly, the Court in *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), determined that the Eleventh Amendment confers immunity from suits in federal court against unconsenting States by foreign states, although the Amendment would on its face only bar suits brought by "Citizens or Subjects of any Foreign State." The Court relied on the principle recognized in *Hans* that the judicial power granted in Article III may not be extended to lawsuits against unconsenting States even when the literal language of the Eleventh Amendment does not bar such suits. *Id.* at 328.

In *Ex Parte New York*, 256 U.S. 490 (1921), the Court held that although the Eleventh Amendment would appear to apply only to "suit[s] in law or equity," the States enjoy sovereign immunity from common law suits in admiralty as well. The case arose under Article III's grant of power to the Federal Judiciary to hear "all Cases of admiralty and maritime Jurisdiction," U.S. Const. Art. III, sec. 2, cl. 1, and was an *in personam* suit against the State of New York. 256 U.S. at 501. Because the Court understood strictures of state sovereign immunity to bar suits against States brought under the authority of the judicial power in Article III, the Court explained that "the entire judicial power granted by the Constitution" does not include the authority to permit a private person to prosecute a suit in admiralty against an unconsenting State. *Id.* at 497. But see *California v. Deep Sea Research, Inc.*, 523 U.S. 491

(1998) (Eleventh Amendment does not bar admiralty suits *in rem*).

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court invalidated Congress' attempt to abrogate the States' sovereign immunity from suit in federal court under a statute passed pursuant to the Indian Commerce Clause. The Court found that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73; see also *id.* at 64 ("[T]he Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III. The text of the Amendment itself is clear enough on this point"). The elemental requirement of an assertion of *judicial* power to the application of the Eleventh Amendment has been recognized in numerous other opinions of this Court. See *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 362 (2001) ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court"); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that state sovereign immunity principles bar proceedings against States in their own judicial courts); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999) (the Eleventh Amendment "repudiated the central premise of *Chisholm* [*v. Georgia*] that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union"); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("the judicial authority in Article III is limited by this sovereignty"); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984) ("In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III").

The Eleventh Amendment prohibits Congress from enacting a private right of action enforceable by suit against an unconsenting State in federal judicial fora. The language of

the Amendment and the opinions of this Court illustrate that an examination of whether there is state immunity from the exercise of judicial power arises only upon the exercise of that power. On the other hand, there is no evidence that the constitutional design contemplates state sovereign immunity from Executive Branch authority that does not implicate judicial power; all the relevant cases speak in terms of state sovereign immunity's explicit and implicit limits on the judicial power established in Article III. It is therefore necessary to examine whether the Commission exercises judicial power in order to determine whether the Eleventh Amendment can affect its adjudication of complaints.

1. The Federal Maritime Commission does not exercise the judicial power of the United States

This Court has explained that an agency like the Commission is not capable of exercising judicial power. In *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), the Court addressed whether the Tax Court exercises judicial power and is a court of law under the Constitution's Appointments Clause.[6] Finding that Congress had established the Tax Court as "an Article I legislative court," *Freytag*, 501 U.S. at 888, the Court ruled that "[w]e cannot hold that an Article I court * * * can exercise the judicial power of the United States and yet cannot be one of the 'Courts of Law.'" *Id.* at 889-890.[7] The Court in *Freytag* found

[6] The Appointments Clause provides: "[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, sec. 2, cl. 2.

[7] The Court noted that Congress had "enacted legislation in 1969 with the express purpose of 'making the Tax Court an Article I court rather than an executive agency.' S. Rep. No. 91-552, p. 303 (1969)." 501 U.S. at 887. Prior to this enactment, the Court had held that the predecessor Board of Tax Appeals exercised executive power. *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 725 (1929). There is no evidence of congressional intent to establish the Federal Maritime Commission as an "Article I court" exercising judicial power.

that Congress' creation of a tribunal authorized to exercise the judicial power of the United States confers the status of a court of law under the Constitution, and creates in that tribunal the capacity to exercise the appointment power. The Court emphasized the Constitution's restraint on the diffusion of such power, *id.* at 892, and enunciated a test to determine whether a tribunal is vested with judicial power to ensure that any diffusion is properly limited. The test examines a tribunal's "functions to define its constitutional status and its role in the constitutional scheme." *Id.* at 890.

Considering the Tax Court's functions, this Court emphasized its "exclusively judicial role [which] distinguishes it from other non-Article III tribunals that perform multiple functions." *Freytag*, 501 U.S. at 892. An examination of the Commission's myriad functions demonstrates that, unlike the Tax Court, it does not have an exclusively judicial role. The Commission is authorized to carry out its powers through rulemaking as well as adjudication, may launch investigations on its own initiative, and has numerous regulatory responsibilities apart from its obligation to adjudicate complaints. See, *e.g.*, 46 U.S.C. app. 1704-1706 (requiring marine terminals and ocean common carriers to file agreements affecting competition with the Commission; such agreements are exempted from the antitrust laws but are subject to agency scrutiny of anticompetitive effects); 46 U.S.C. app. 1707 (regulating the publication of tariffs and the filing of service contracts); 46 U.S.C. app. 1708 (regulating foreign-government-controlled ocean common carriers); 46 U.S.C. app. 1716 (authorizing the Commission to "prescribe rules and regulations").

Further, the Commission does not share the Tax Court's primary similarity to federal district courts, namely, the authority to punish contempt. See *Freytag*, 501 U.S. at 891 (the Tax Court "has authority to punish contempts by fine or imprisonment"). Compare *International Union v. Bagwell*, 512 U.S. 821, 831 (1994) (power of contempt is a judicial

power "'necessary to the exercise of all others'") (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)). The Commission cannot enforce its subpoenas but must request that the Attorney General seek district court enforcement in the event of noncompliance. 46 U.S.C. app. 1713(c).

Like a district court, the Tax Court has no program interests and no regulatory stake in its jurisdiction over any given case. The Commission, on the other hand, has an interest in the execution and enforcement of its regulatory program, and relies in part on the filing of private complaints to bring Shipping Act violations to its attention. Moreover, the Commission has a great interest in the interpretation of the Shipping Act's provisions, and this interest is advanced through the agency's status as a party in proceedings to review its orders in the courts of appeals. 28 U.S.C. 2348. Courts, of course, are not made parties to appeals of their decisions. The Commission recognized the significant effects SCSPA's claim of immunity might have on the administration of the Shipping Act in its order in this case: "Commission jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports." Pet. App. 33a.

The Tax Court's opinions are examined under the same standard of review that applies to district court rulings. *Freytag*, 501 U.S. at 891. The Commission's orders, however, are reviewed under the standards applicable to an administrative agency's findings and statutory interpretations. See *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607 (1966) (applying substantial evidence standard to the Commission's findings of fact); *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and *United States v. Mead*, 533 U.S. 218 (2001) (defining standards of review of an administrative agency's statutory interpretations).

Thus, application of the analysis established in *Freytag* demonstrates that the major indicia of judicial power cannot

be found in the Commission's exercise of its regulatory authority to adjudicate complaints. It is solely the extension of judicial power to a suit against an unconsenting State that the Eleventh Amendment forbids.

2. An administrative adjudication by the Federal Maritime Commission is not a suit in law or equity

Not only is the exercise of judicial power a necessary prerequisite to the analysis of whether a State is immune from a proceeding, but the proceeding must also be a "suit," because the Eleventh Amendment protects unconsenting States from "suit[s] in law or equity," and from suits in admiralty. See *Ex Parte New York*, 256 U.S. 490 (1921); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997) ("The Amendment, in other words, enacts a sovereign immunity from suit"). The filing of a complaint before the Commission does not constitute a "suit," because it is not a judicial proceeding: a suit is "the prosecution of some demand in a court of justice." *Cohens v. Virginia*, 6 Wheat. 264, 407 (1821) (Marshall, C.J.). In this regard, it must be observed that the Eleventh Amendment did not create the States' sovereign immunity, but confirmed its existence. *Alden*, 527 U.S. at 728-729. It is significant that the Amendment specifically uses the word "suit," as opposed to "proceeding" or "cause of action," because it thereby confirms state immunity in terms limited to the meaning of "suit," and that meaning does not extend to the type of adjudication heard by the Commission. For example, in *Upshur County v. Rich*, 135 U.S. 467 (1890), it was determined that a case before an administrative "county court" could not be removed to a federal court because the county court did not exercise judicial power. This Court noted that "a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions * * * is purely administrative in its character, and cannot, in any just sense, be called a suit." *Id.* at 477. The Court's opinion illustrates that the exercise of judicial power is necessary for a proceeding to properly be considered a suit.

While many of this Court's decisions have found that the Eleventh Amendment is not limited by its terms, *supra* at 17, none has ever expressed an intention to expand the scope of sovereign immunity beyond the meaning of the word "suit." The difference between a "suit" as that term is used in the Eleventh Amendment and the Commission's adjudication of a complaint is not merely semantic, but instead reflects the different powers implicated by, and the different objectives of, administrative decisionmaking. Commission adjudication of a privately-filed complaint is a form of executive enforcement of the law, as the Commission noted in its order.

> A private cause of action against an arm of the state brought before an administrative agency, because it invokes the remedial powers of the Executive branch, is in many respects more analogous to a Federal investigation than it is to a suit brought by a private party before a Federal or state court.

Pet. App. 34a. This exercise of executive power serves a different purpose than the employment of judicial power to resolve a lawsuit. Had Congress wanted simply to ensure that private complaints under the Shipping Act are resolved, it presumably would have authorized the filing of a lawsuit in court to vindicate such rights.[8] The Commission, however, is charged with the *administration* of the Act, and with adjudicating complaints under the aegis of a statutorily-mandated concern for safeguarding and regulating transportation in the Nation's oceanborne foreign commerce.

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[8] The Shipping Act does not authorize the filing of a lawsuit alleging violations of the Act. See, *e.g.*, *Government of Guam v. American President Lines*, 28 F.3d 142 (D.C. Cir. 1994) (rejecting a claim of an implied cause of action in court under the 1916 Act); *D.L. Piazza Co. v. West Coast Line, Inc.*, 210 F.2d 947 (2nd Cir.) (same), cert. denied, 348 U.S. 839 (1954). The Commission's jurisdiction over complaints alleging statutory violations is exclusive.

See 46 U.S.C. app. 1701 (declaration of policy). Thus, the Commission's adjudication of a privately-filed complaint comports with its authority to make subordinate policies in order to execute the broad policies promulgated by Congress with respect to oceanborne transportation. The Commission's interpretations of the Shipping Act shape the continuing development of the standards applicable to the shipping industry by determining, for instance, what constitutes an "unreasonable preference" or an "unreasonable prejudice." 46 U.S.C. app. 1709(d)(4). This is broader than, and different from, the more narrow goal of settling the rights of one party against the rights of another in a lawsuit.

C. PRINCIPLES OF STATE SOVEREIGN IMMUNITY FROM SUIT ARE DEFINED AND CONSTRAINED BY THE CONSTITUTION'S HISTORY AND STRUCTURE

Determination of the scope of the States' sovereign immunity from suit is not a purely functional analysis that examines whether a proceeding is adversarial in nature or whether a State's treasury may be affected. See *Seminole Tribe*, 517 U.S. at 58 ("the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment"). Rather, the Court has recognized that structural and historical limits apply to the States' immunity from suit. In essence, the Court has found that the States are immune from the judicial power granted to the Federal Government in Article III, and from the judicial power exercised in the States' own courts, unless they consent to suit.

1. State sovereign immunity from administrative adjudications cannot be inferred from the history and structure of the Constitution

In *Nevada v. Hall*, 440 U.S. 410 (1979), the Court declined to extend state sovereign immunity from suit to a tort action for monetary damages brought by a citizen of

California against the State of Nevada in a California court. The Court held that neither Article III, establishing the judicial power of the United States, nor the Eleventh Amendment, limiting that power, provide an explicit or implicit constitutional basis upon which to impose restrictions on the authority of state courts to hear lawsuits by private persons against other States. *Id.* at 421. Relying on constitutional history, the Court noted that the ratification debates which addressed the possibility that the States might be sued against their will focused on the scope of the judicial power authorized in Article III. *Id.* at 419. Although the Founders may have assumed that comity would protect a State from being sued in another State's courts, the need for constitutional protection from such suits was not discussed, and the Court found no justification to infer it. *Id.* at 419-421.

The Constitution's establishment of a limited federal judicial power imposes a structural limit on the scope of the States' immunity from judicial authority. For this reason, the Court in *Hall* found that a claim of sovereign immunity lacking foundation in either the Eleventh Amendment or the demarcation of judicial power in Article III "must find its basis elsewhere in the Constitution." 440 U.S. at 421. The Court rejected the State of Nevada's claim that the constitutional structure "implicitly establishes" state immunity from suit in the courts of other States. *Id.* at 424. Similarly, in *Howlett v. Rose*, 496 U.S. 356 (1990), the Court concluded that a Florida court could not apply common law principles of sovereign immunity to bar actions brought under federal law. The Court confirmed in *Howlett* that state sovereign immunity from suit is a doctrine that arises from the Constitution itself, and that a defense asserting such immunity must have a constitutional basis to be upheld. *Id.* at 383.

The decisions in *Hall* and *Howlett* demonstrate that a state sovereign immunity defense must be based upon a constitutional provision, or an implicit constitutional

assumption, to be sustained. It is incontrovertible that the Constitution does not *explicitly* preclude federal regulation through reliance on administrative adjudications initiated by private persons against state entities. Moreover, there is nothing to indicate that the constitutional structure *implicitly* establishes state immunity from the Commission's adjudication of a privately-filed complaint. Rather, it is clear that the Federal Government may regulate state-run marine terminals, *California v. United States*, 320 U.S. at 586, and there is no "adjudicatory exception" to this exercise of federal authority.

In addition, this Court has recognized that the powers and immunities reserved to the States are those that existed before the adoption of the Constitution. In *McCulloch v. Maryland*, 4 Wheat. 316 (1819) (Marshall, C.J.), the Court found that the power to tax corporations chartered by Congress was not reserved to the States, and that constitutional silence on the matter did not provide evidence of such power. An "original right to tax" federal entities "never existed, and the question whether it has been surrendered, cannot arise." *Id.* at 430. Because the States did not enter the Union with immunity from Executive Branch power exercised in an adjudicatory form, a decision that they are not immune from Commission jurisdiction over privately-filed complaints "does not deprive the States of any resources which they originally possessed." *Id.* at 436. See also *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802-803 (1995).

2. *Alden v. Maine* does not suggest that the States are immune from federal administrative adjudications

The court of appeals relied on this Court's decision in *Alden*, 527 U.S. 706, to reach the conclusion that the Commission's adjudication of a complaint filed against a state-run marine terminal implicates state immunity principles. However, the principles explicated in *Alden*

apply, as a matter of historical origin, only to proceedings before a State's own courts.

In *Alden*, the Court examined whether Congress' explicit abrogation of the States' immunity from suit in their own courts in lawsuits filed by private persons to enforce provisions of the Fair Labor Standards Act was permissible. Based upon the discussion of state immunity from suit in several of the States' ratification conventions, the Court in *Alden* found that "the structure of the original Constitution itself" guaranteed the States' immunity in their own courts. *Id.* at 728. Nevertheless, the issue in *Alden* whether the States retained immunity from suit in their own courts when Congress had specifically sought to abrogate that immunity was a question of first impression. *Id.* at 741. The Court addressed the question by analyzing the "history, practice, precedent, and the structure of the Constitution" to determine whether state immunity from suit in state courts could be abrogated by an Act of Congress. *Ibid.* The Court concluded that the States' immunity from suit in their own courts "was a principle so well established that no one conceived it would be altered by the new Constitution," *ibid*, and that congressional practice and the Court's precedents did not support the existence of a congressional power to abrogate this traditional immunity. *Id.* at 743-748.

The Court in *Alden* thus determined that the States entered the Union with an immunity from suit in their own courts, and that the Constitution did not require them to surrender this immunity. However, a historically-grounded and *traditional* immunity from suit in the States' own courts cannot be the source of the much broader immunity from all adversarial proceedings discovered by the court of appeals in this case. See Pet. App. 24a. There is no evidence that state immunity from the adjudication of complaints by *executive officers* was an established principle at the time of the adoption of the Constitution. No basis for the existence of this principle was cited by the court of appeals. See *id.* at 13a

("To ask the question is to answer it"). Nor is the other primary concern that informed the Court in *Alden* present here: Congress has not attempted to "commandeer the entire political machinery of the State against its will" by requiring a State's courts to hear lawsuits against the State itself. 527 U.S. at 749. In this case, Congress has simply sought to ensure the effective administration of the Shipping Act through the Commission's adjudication of complaints alleging statutory violations.

The decisions in *Hall* and *Howlett*, and the result urged by the Commission in this case, are consistent with *Alden*, in which the Court noted that the scope of state sovereign immunity "is demarcated * * * by fundamental postulates implicit in the constitutional design," 527 U.S. at 729, because there is no proof, historical or structural, that the constitutional design implicitly establishes state immunity from Executive Branch regulatory authority. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The Court in *Alden* noted that in *Hall* it had "determined the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another." 527 U.S. at 738. In this case, the Constitution does not reflect an understanding that the States would extend their sovereign immunity into the operations of the Executive Branch.

3. The Founders' understanding of the importance of maritime commerce is further evidence that the States do not enjoy sovereign immunity from administrative adjudications before the Federal Maritime Commission

The constitutional necessity of uniformity in the regulation of maritime commerce limits the States' sovereignty with respect to the Federal Government's authority to regulate that commerce. Although it is clear that Congress may not vest in the Judicial Branch the authority to hear suits concerning maritime commerce against unconsenting States, *Ex Parte New York*, 256 U.S.

490 (1921), the application of sovereign immunity principles to the regulation of maritime commerce by *executive* officers would be inconsistent with the Founders' concern that such commerce required uniform national treatment.

Because "the contours of sovereign immunity are determined by the Founders' understanding," *Alden*, 527 U.S. at 734, it is necessary to consider how that understanding applies to the case presently before this Court. "Maritime commerce was * * * the jugular vein of the Thirteen States. The need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." F. Frankfurter and J. Landis, The Business of the Supreme Court 7 (1927). The failure of the Articles of Confederation to adequately provide for the regulation of commercial relationships between the States was crucial to the process by which the transfer of power to the Federal Government under the Constitution was accomplished. See The Federalist No. 42, at 267 (C. Rossiter ed. 1961) (J. Madison) (describing the failure of the Articles of Confederation to regulate commerce among the States); 3 Records of the Federal Convention, at 334 (M. Farrand ed. 1966) (E. Randolph).

Alexander Hamilton's explanation of the scope of the States' immunity from suit in The Federalist No. 81 has been a primary source in determining the proper reach of the Eleventh Amendment. See, *e.g.*, *Hans*, 134 U.S. at 12-13. Hamilton clarified that "[u]nless therefore, there is a surrender of this [sovereign] immunity in the plan of the convention, it will remain with the States," referring to the States' immunity from the judicial power authorized in Article III. See The Federalist No. 81, at 487-488. However, Hamilton's explanation of the States' immunity from suit must be read in light of his understanding of the essential powers vested in the Federal Government by the "plan of the convention." Accordingly, in The Federalist No. 81, Hamilton referred to The Federalist No. 32, in which he had asserted that the States did not possess sovereignty:

> where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.

The Federalist No. 32, at 198. The third of these conditions, reflecting the need for national uniformity, applies to the case presently before this Court. See The Federalist No. 22, at 144 (Hamilton) (asserting that the lack of authority over commerce had harmed efforts to gain favorable foreign commercial relations and would "continue to do so as long as the same obstacles to a uniformity of measures continue to exist").

The concerns of the States that were dependent upon the ports of other States for the movement of their imports or exports, as well as the concerns of certain exporting States that the "carrying states" (*i.e.*, States whose citizens were substantially involved in the transportation of goods) would be able to levy protective taxes as a way of excluding foreign competition, were discussed in the ratification debates. For example, in the New York ratifying convention, Hamilton addressed the differences between the "navigating and non-navigating states" and their "dissimilarity of interests and views respecting foreign commerce." 3 Records of the Federal Convention, at 332-333. Similar concerns with respect to federal power over maritime commerce were expressed in other state ratification conventions. See 1 Debates in the State Conventions on the Adoption of the Constitution (J. Elliot ed. 1888), at 186 (J. Iredell); 2 Debates in the State Conventions on the Adoption of the Constitution, at 189 (O. Ellsworth); 3 Debates in the State Conventions on the Adoption of the Constitution, at 312-313 (J. Madison); see also The Federalist No. 42, at 267-268 (J. Madison). The debates illustrate the Founders' concern with protecting the

States from other States' use of their ports for discriminatory purposes, and their determination to grant the Federal Government uniform authority over such matters. The Founders' uneasiness with the States' power to discriminate against one another through their ports found analogous expression in the Constitution's Port Preference Clause, U.S. Const., Art. I, sec. 9, cl. 6, which prohibits the Federal Government itself from "using its commerce power to channel commerce through certain favored ports." *United States v. Lopez*, 514 U.S. 549, 587 (1995) (Thomas, J., concurring).

The concern that the regulation of maritime commerce called for a uniform national power was borne out in the early years of the Federal Government. In *Gibbons v. Ogden*, 9 Wheat. 1 (1824), the Court found that the State of New York's grant of exclusive authority to navigate its waters by certain types of vessels was beyond the State's powers. The Court's understanding of the extent of the federal interest in maritime regulation in *Gibbons* was notable: "if a foreign voyage may commence or terminate at a port within a state, then the power of Congress [to regulate foreign commerce] may be exercised within a state." 9 Wheat. at 195. Similarly, relying on *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299 (1852), the Court recently observed "that there would be instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority," although the Court in *Cooley* had upheld the State of Pennsylvania's regulations in that case as an appropriate exercise of authority over *local* conditions. *United States v. Locke*, 529 U.S. 89, 99 (2000). Against the backdrop of this historical evidence, the Court in *Locke* also noted that maritime commerce is a field in which "the federal interest has been manifest since the beginning of our Republic," and stated that the federal government must be free to regulate vessel navigation "without embarrassment from intervention of the separate States." *Ibid.*

Congressional exercise of its authority to regulate oceanborne transportation in the Nation's foreign commerce through the Shipping Act, whether by the adjudication of complaints or through other means, limits the States' authority to act in a manner inconsistent with that exercise. Yet because the Shipping Act does not wrest control of terminal facilities from state governments, *supra* at 14, it also respects "the established federal-state balance in matters of maritime commerce." *Locke*, 529 U.S. at 106. See also *Plaquemines*, 838 F.2d at 543 (finding that Commission regulation does not remove control from local ports authorities). Application of state sovereign immunity principles to adjudications before the Commission would therefore be inconsistent with the requirement of national uniformity in the regulation of maritime commerce.

Uniformity is more than a theoretical concern for the Commission, and is especially relevant because marine terminals, state-run or otherwise, compete against one another for business. See, *e.g.*, *South Carolina State Ports Auth. v. Georgia Ports Auth.*, FMC Docket No. 84-5, 49 Fed. Reg. 7657 (March 1, 1984); *Port Utilities Comm'n of Charleston, S.C. v. The Carolina Co.*, 1 U.S.S.B. 61 (1925). This Court has recognized that it is critical not to "divide persons 'furnishing wharfage, dock, warehouse, or other terminal facilities' into regulated and unregulated groups." *United States v. American Union Transp., Inc.*, 327 U.S. 437, 443 (1946). To find state-run marine terminals immune from complaint proceedings before the Commission would give them a competitive advantage over other marine terminals, and would consequently "defeat[] the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *California v. United States*, 320 U.S. at 585-586.

D. THE PUBLIC RIGHTS DOCTRINE PROTECTS THE STATES' SOVEREIGN IMMUNITY FROM ENCROACHMENT BY LIMITING THE CIRCUMSTANCES UNDER WHICH CONGRESS MAY AUTHORIZE NON-ARTICLE III TRIBUNALS TO ADJUDICATE COMPLAINTS

In *Thomas v. Union Carbide*, 473 U.S. 568, 583 (1985), the Court observed that Congress may "vest decisionmaking authority in tribunals that lack the attributes of Article III courts." Congress is permitted to authorize the adjudication of certain matters by administrative agencies with limited involvement from the Judicial Branch when the right asserted in the adjudication is a public right. The Court has defined a public right as including "a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution." *Id.* at 593-594. The Court has found that, pursuant to the public rights doctrine, Congress may authorize the administrative resolution of disputes between private parties. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989) ("we rejected the view that a matter of public rights must at a minimum arise between the government and others") (internal quotation marks omitted) (citing *Northern Pipeline Construction Co v. Marathon Pipeline Co.*, 458 U.S. 50, 69 (1982) (opinion of Brennan, J.)).

The public rights doctrine both allows Congress to authorize the adjudication of complaints in administrative tribunals and limits this authority in order to prevent Congress from avoiding the requirements of Article III. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (Article III forbids "congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts") (quoting *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)). These limits complement the Eleventh Amendment's confirmation of state sovereign

immunity from federal judicial power. The public rights doctrine, through its protection of Article III from impermissible erosion, ensures that Congress cannot undermine the principles of sovereign immunity that protect the States from the jurisdiction of Article III courts.

1. The right to file a complaint under the Shipping Act is a public right

That the right to file a complaint under the Shipping Act is a public right is confirmed by considering the principles this Court elucidated in *Schor*, 478 U.S. 833. The Court established a three-part test to determine whether a right created by Congress and adjudicated by an administrative agency is a public right. *Id.* at 851. First, the *Schor* test requires the Court to consider the right's source. *Ibid.* Rights arising at common law and some statutory rights that replace common law causes of action are generally presumed to require judicial resolution. *Id.* at 853. Conversely, an agency's adjudication of congressionally-created rights does not offend the domain of Article III. See, *e.g.*, *Thomas*, 473 U.S. at 584 (statute in question did not replace a traditional cause of action).

Under the Shipping Act, both the adjudicatory procedure applicable to complaints and the subject matter of such complaints were created by Congress in the statute and do not reflect preexisting common law rights. The Shipping Act sets forth a list of conduct that is prohibited to participants in maritime commerce, 46 U.S.C. app. 1709, to ensure that principles of competition and efficiency apply to the transportation system in the oceanborne commerce of the United States. See 46 U.S.C. app. 1701 (declaration of policy). In this case, Maritime Services alleged that SCSPA had given an unreasonable preference or imposed an unreasonable disadvantage by supplying berthing space to its competitor, but not to Maritime Services, and had unreasonably refused to deal with Maritime Services.

The statutory proscription in the Shipping Act barring unreasonable preferences is based upon section 3 of the ICA, 24 Stat. 379, 380 (1887), which first prohibited such preferences and prejudices to the common carriers it regulated. Section 16 of the 1916 Act, using virtually identical language, applied the proscription to "other persons subject to th[e] act," including marine terminals. 39 Stat. 728, 734. This language was carried over, with little change, as sections 10(b)(11) and (12) of the Shipping Act of 1984, 98 Stat. 67, 78 (1984), former 46 U.S.C. app. 1709(b)(11) and (12), applicable to marine terminal operators by section 10(d)(3), 98 Stat. 67, 80 (1984), former 46 U.S.C. app. 1709(d)(3). The prohibition is presently located at 46 U.S.C. app. 1709(d)(4), pursuant to the Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902.

The other statutory prohibition advanced by Maritime Services in its complaint, that SCSPA had unreasonably refused to deal, was also established by Congress in the Shipping Act, initially as sections 10(b)(12) and (13), former 46 U.S.C. app. 1709(b)(12) & (13), and presently as section 10(b)(10), 46 U.S.C. app. 1709(b)(10), 112 Stat.1902, 1910. Maritime Services' right to file a complaint in this case alleging that SCSPA had given an unreasonable preference or imposed an unreasonable disadvantage, or unreasonably refused to deal, thus originates from an Act of Congress and does not reflect a preexisting common law right - there are no common law provisions against undue preferences in oceanborne transportation.

The second step in the *Schor* test is to examine the interests that convinced Congress to vest in the Commission the authority to hear complaints. 478 U.S. at 855. In *Schor*, the Court explained Congress' determination to establish the Commodity Futures Trading Commission as an adjudicative body: the need to create a forum for the adjudication of complaints, the importance of vesting such adjudication in an expert regulatory agency, and the significance of the agency's role in ensuring the effectiveness of the regulatory scheme. *Id.* at 855-856.

This analysis applies equally to the Federal Maritime Commission. The Shipping Act is a particularized area of law, and it is well-established that the agency is "the expert body established by Congress for safeguarding this specialized aspect of the national interest." *California v. United States*, 320 U.S. at 584 (referring to the U.S. Maritime Commission, predecessor to the Federal Maritime Commission). Moreover, the objectives of the Shipping Act are hindered by noncompliance, and the agency does not have adequate resources to investigate on its own motion all possible statutory violations: at the time of the writing of this brief, the Commission employs a total of eight investigators to pursue violations of the Act. It is therefore necessary for private persons operating in maritime commerce to file complaints in order to ensure that Shipping Act rights are enforced and vindicated, and the adjudication of privately-initiated complaints is an efficient substitute for agency-initiated investigations of prohibited conduct. As explained above, Congress has specifically found that it was crucial to the success of the regulatory scheme that both public and private marine terminals be regulated by the Act. See *supra* at 12; see also *California v. United States*, 320 U.S. at 586. Moreover, the application of principles of common carriage to marine terminals operating in United States foreign commerce undeniably implicates the public interest. "The law for centuries has recognized that public wharves, piers and marine terminals are affected with a public interest." *American Export-Isbrandtsen Line, Inc. v. Federal Maritime Comm'n*, 444 F.2d 824 (D.C. Cir. 1970). See also *Munn v. Illinois*, 94 U.S. 113, 133 (1876) (recognizing that there are "businesses in which the whole public has a direct and positive interest"). Congress enhanced administrative effectiveness and efficiency in a field of great public interest when it vested in the Commission the authority to adjudicate privately-filed complaints. Compare *Schor*, 478 U.S. at 856 (Congress' objective was "to ensure the effectiveness of [the regulatory] scheme").

The third step in the *Schor* analysis is to examine whether the statutory design secures adequate participation by the Judicial Branch without encroaching on its prerogatives. 478 U.S. at 854. Congress has achieved this goal by providing for review of the Commission's orders in the courts of appeals, which have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the agency's decisions in its adjudication of complaints. 28 U.S.C. 2342. This Court has held that public rights are susceptible of extremely limited judicial review, and the appellate review applicable to the Shipping Act is therefore more than sufficient to meet this standard. See *Thomas*, 473 U.S. at 592 (upholding statutory scheme that allowed judicial review of agency adjudication only in cases of fraud). Moreover, the enforcement of Commission orders can only be imposed by a federal district court. See 46 U.S.C. app. 1713(c) (subpoenas); 46 U.S.C. app. 1712(e) (civil penalties). Finally, because the Commission is responsible for administering a "particularized area of law," it does not intrude upon the terrain of Article III. *Northern Pipeline*, 458 U.S. at 85 (opinion of Brennan, J.).

2. The public rights doctrine would not permit Congress to undermine the States' traditional immunity from suit

Pursuant to the application of the analysis in *Schor*, the right to file a complaint under the Shipping Act is a public right. Congress may vest in an administrative agency like the Commission the power to adjudicate a public right only when there is a valid and specific need to do so, and only with respect to a subject matter that does not require judicial resolution. See *Schor*, 478 U.S. at 853-854. The public rights doctrine thereby operates as a constitutional limitation on congressional power to place the adjudication of disputes outside of Article III, and principles of state sovereign immunity from suit operate as "a constitutional limitation on the federal judicial power established in Art. III."

Pennhurst, 465 U.S. at 98. Because these limitations are complementary, the States' sovereign immunity is neither implicated by, nor threatened with erosion from, the adjudication by the Commission of a matter involving public rights in a complaint against a state-run marine terminal. Compare *Granfinanciera*, 492 U.S. at 53 ("the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal"). The States are immune under the Eleventh Amendment from suits which must be heard in constitutional courts, but the States are not immune from regulation when that regulation takes a constitutionally permissible adjudicatory form.

The court of appeals in this case was concerned that Congress had attempted an "end-run around the Constitution" by vesting in the Commission the capacity to hear complaints that might be barred by the Eleventh Amendment if they were heard in a district court. Pet. App. 12a-13a. There is no indication, however, that Congress established the regulation of marine terminals through the administrative adjudication of privately-filed complaints as a means of circumventing the Eleventh Amendment. Moreover, this Court has already clarified that Congress is not permitted to authorize administrative agency adjudications simply to avoid the restraints inherent in Article III. In *Schor*, the Court warned that Congress could not permissibly create "a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article II supervision or control and without evidence of valid and specific legislative necessities." 478 U.S. at 855. As one commentator has noted, under this Court's jurisprudence "[w]holesale transfers of jurisdiction, whose sole purpose is to destroy the protection of Article III, are plainly invalid." Paul Bator, The Constitution as

Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L. J. 233, 258 (1989).

Furthermore, this Court has held, with respect to traditional causes of action, that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 284 (1855). See also *Granfinanciera*, 492 U.S. at 54-55 ("If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact * * * it must be adjudicated by an Article III court"); *Thomas*, 473 U.S. at 584 ("Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review"); *Crowell v. Benson*, 285 U.S. 22 (1932). There is no private cause of action in court alleging a violation of the Shipping Act and seeking monetary reparations, *supra* at 24 n.8, and Congress did not replace traditional common law rights when it established the Shipping Act, but instead created new statutory rights.

Finally, the Court has held that public rights are susceptible of judicial determination but do not require it, because "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." *Thomas*, 473 U.S. at 589 (quoting *Northern Pipeline*, 458 U.S. at 68 (opinion of Brennan, J.)). The Eleventh Amendment and principles of state sovereign immunity from suit should not apply to a regulatory scheme in which Congress has chosen to render more efficient the investigation and resolution of possible statutory violations by permitting private parties to file complaints. Because the

adjudication by the Commission of a matter involving a public right does not require judicial resolution, the Constitution should not require that the States be immune from its administrative resolution.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. Section 3(14) of the Shipping Act of 1984, 46 U.S.C. app. 1702(14), provides as follows:

> (14) "marine terminal operator" means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49.

3. Section 10(b)(10) of the Shipping Act of 1984, 46 U.S.C. app. 1709(b)(10), provides as follows:

> **(b) Common carriers**
>
> No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—
>
> * * *
>
> (10) unreasonably refuse to deal or negotiate.

4. Sections 10(d)(3) and 10(d)(4) of the Shipping Act of 1984, 46 U.S.C. app. 1709(d)(3) and (d)(4), provide as follows:

> (3) The prohibitions in subsections (b)(10) and (13) of this section apply to marine terminal operators.
>
> (4) No marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue

or unreasonable prejudice or disadvantage with respect to any person.

5. Section 11 of the Shipping Act of 1984, 46 U.S.C. app. 1710, provides as follows:

1710. Complaints, investigations, reports, and reparations.

(a) Filing of complaints

Any person may file with the Commission a sworn complaint alleging a violation of this chapter, other than section 1705(g) of this Title, and may seek reparation for any injury caused to the complainant by that violation.

(b) Satisfaction or investigation of complaints

The Commission shall furnish a copy of a complaint filed pursuant to subsection (a) of this section to the person named therein who shall, within a reasonable time specified by the Commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied, the Commission shall investigate it in an appropriate manner and make an appropriate order.

(c) Commission investigations

The Commission, upon complaint or upon its own motion, may investigate any conduct or agreement that it believes may be in violation of this chapter. Except in the case of an injunction granted under subsection (h) of this section, each agreement under investigation under this section remains in effect until the Commission issues an order under this subsection. The Commission may by order disapprove, cancel, or modify any agreement filed under section 1704(a) of this Title that operates in violation of this chapter. With respect to agreements inconsistent with section 1705(g) of this Title, the Commission's sole remedy is under section 1705(h) of this Title.

(d) Conduct of investigation

Within 10 days after the initiation of a proceeding under this section, the Commission shall set a date on or before which its final decision will be issued. This date may be extended for good cause by order of the Commission.

(e) Undue delays

If, within the time period specified in subsection (d) of this section, the Commission determines that it is unable to issue a final decision because of undue delays caused by a party to the proceedings, the Commission may impose sanctions, including entering a decision adverse to the delaying party.

(f) Reports

The Commission shall make a written report of every investigation made under this chapter in which a hearing was held stating its conclusions, decisions, findings of fact, and order. A copy of this report shall be furnished to all parties. The Commission shall publish each report for public information, and the published report shall be competent evidence in all courts of the United States.

(g) Reparations

For any complaint filed within 3 years after the cause of action accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this chapter plus reasonable attorney's fees. Upon a showing that the injury was caused by activity that is prohibited by section 1709(b)(3) or (6) of this Title or section 1709(c)(1) or (3) of this Title, or that violates section 1709(a)(2) or (3) of this Title, the Commission may direct the payment of additional amounts; but the total

recovery of a complainant may not exceed twice the amount of the actual injury. In the case of injury caused by an activity that is prohibited by section 1709(b)(4)(A) or (B) of this Title, the amount of the injury shall be the difference between the rate paid by the injured shipper and the most favorable rate paid by another shipper.

(h) Injunction

(1) In connection with any investigation conducted under this section, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the issues under investigation. Any such suit shall be brought in a district in which the defendant resides or transacts business.

(2) After filing a complaint with the Commission under subsection (a) of this section, the complainant may file suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the complaint. Any such suit shall be brought in the district in which the defendant has been sued by the Commission under paragraph (1); or, if no suit has been filed, in a district in which the defendant resides or transacts business. A defendant that prevails in a suit under this paragraph shall be allowed reasonable attorney's fees to be assessed and collected as part of the costs of the suit.

6. Section 12 of the Shipping Act of 1984, 46 U.S.C. app. 1711, provides as follows:

1711. Subpoenas and discovery.

(a) In general

In investigations and adjudicatory proceedings under this chapter—

(1) depositions, written interrogatories, and discovery procedures may be utilized by any party under rules and regulations issued by the Commission that, to the extent practicable, shall be in conformity with the rules applicable in civil proceedings in the district courts of the United States; and

(2) the Commission may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence.

(b) Witness fees

Witnesses shall, unless otherwise prohibited by law, be entitled to the same fees and mileage as in the courts of the United States.

7. Section 13(e) of the Shipping Act of 1984, 46 U.S.C. app. 1712(e), provides as follows:

(e) Failure to pay assessment

If a person fails to pay an assessment of a civil penalty after it has become final or after the appropriate court has entered final judgment in favor of the Commission, the Attorney General at the request of the Commission may seek to recover the amount assessed in an appropriate district court of the United States. In such an action, the court shall enforce the Commission's order unless it finds that the order was not regularly made or duly issued.

8. Section 14 of the Shipping Act of 1984, 46 U.S.C. app. 1713, provides as follows:

1713. Commission orders.

(a) In general

Orders of the Commission relating to a violation of this chapter or a regulation issued thereunder shall be made, upon sworn complaint or on its own motion, only after opportunity for hearing. Each order of the Commission shall continue in force for the period of time specified in the order or until suspended, modified, or set aside by the Commission or a court of competent jurisdiction.

(b) Reversal or suspension of orders

The Commission may reverse, suspend, or modify any order made by it, and upon application of any party to a proceeding may grant a rehearing of the same or any matter determined therein. No rehearing may, except by special order of the Commission, operate as a stay of that order.

(c) Enforcement of nonreparation orders

In case of violation of an order of the Commission, or for failure to comply with a Commission subpoena, the Attorney General, at the request of the Commission, or any party injured by the violation, may seek enforcement by a United States district court having jurisdiction over the parties. If, after hearing, the court determines that the order was properly made and duly issued, it shall enforce the order by an appropriate injunction or other process, mandatory or otherwise.

(d) Enforcement of reparation orders

(1) In case of violation of an order of the Commission for the payment of reparation, the person to whom the

award was made may seek enforcement of the order in a United States district court having jurisdiction of the parties.

(2) In a United States district court the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor for the costs of any subsequent stage of the proceedings, unless they accrue upon his appeal. A petitioner in a United States district court who prevails shall be allowed reasonable attorney's fees to be assessed and collected as part of the costs of the suit.

(3) All parties in whose favor the Commission has made an award of reparation by a single order may be joined as plaintiffs, and all other parties in the order may be joined as defendants, in a single suit in a district in which any one plaintiff could maintain a suit against any one defendant. Service of process against a defendant not found in that district may be made in a district in which is located any office of, or point of call on a regular route operated by, that defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

(e) Statute of limitations

An action seeking enforcement of a Commission order must be filed within 3 years after the date of the violation of the order.

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No. 01-46

In the Supreme Court of the United States

FEDERAL MARITIME COMMISSION, PETITIONER

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Eleventh Amendment or constitutional principles of state sovereign immunity preclude the Federal Maritime Commission from adjudicating a private party's claim that a state agency has violated the Shipping Act of 1984.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	11
Argument:	
Neither the Eleventh Amendment nor related principles of state sovereign immunity preclude the Federal Maritime Commission from adjudicating a private party's claim that a state agency has violated the Shipping Act of 1984	14
A. The State's sovereign immunity is an immunity from suit in court and does not extend to adjudicative proceedings conducted by non-judicial bodies	14
B. An FMC adjudication differs significantly, in respects directly relevant to the sovereign immunity inquiry, from a suit in court	17
C. This Court's decision in *Alden* does not suggest that States are immune from adjudicative proceedings of a non-judicial character	24
D. Because state officials retain legal authority over the allocation of state funds unless and until an FMC order is enforced by a court, the administrative proceeding does not infringe the State's sovereign immunity	28
E. Even if principles of state sovereign immunity precluded the FMC from issuing a reparation order against respondent, the administrative complaint filed in this case would not be subject to dismissal	32

TABLE OF CONTENTS—Continued: Page

Conclusion 34
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Alden v. *Maine*, 527 U.S. 706 (1999) ..... *passim*
Ayers, In re, 123 U.S. 443 (1887) 26, 27
Bakelite Corp., Ex parte, 279 U.S. 438 (1929) 18
California v. *United States*, 320 U.S. 577 (1944) 2, 3
CFTC v. *Schor*, 478 U.S. 833 (1986) 18, 22
Chicago & Grand Trunk Ry. v. *Wellman*, 143 U.S. 339 (1892) 24
Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) 15
Connecticut Dep't of Envtl. Prot. v. *Occupational Safety & Health Admin.*, 138 F. Supp. 2d 285 (D. Conn. 2001), appeal pending, No. 01-6217 (2d Cir.) 26
Delaware Dep't of Health & Soc. Servs. v. *United States Dep't of Educ.*, 772 F.2d 1123 (3d Cir. 1985) 25
Edelman v. *Jordan*, 415 U.S. 651 (1974) 30
Ellis Fischel State Cancer Hosp. v. *Marshall*, 629 F.2d 563 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981) 25
Florida v. *United States*, 133 F. Supp. 2d 1280 (N.D. Fla. 2001), appeal pending, No. 01-12380-HH (11th Cir.) 26
Freytag v. *Commissioner*, 501 U.S. 868 (1991) 17, 21, 22
Gompers v. *Buck's Stove & Range Co.*, 221 U.S. 418 (1911) 19
Gordon v. *United States*, 117 U.S. 697 (1864) 19
Granfinanciera, S.A. v. *Nordberg*, 492 U.S. 33 (1989) 18
Green v. *Mansour*, 474 U.S. 64 (1985) 33
Hans v. *Louisiana*, 134 U.S. 1 (1890) 15

Cases—Continued: Page

Hensel v. *Office of Chief Admin. Hearing Officer*, 38 F.3d 505 (10th Cir. 1994) 25, 26
ICC v. *Brimson*, 154 U.S. 447 (1894) 19
Idaho v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997) 33
International Union v. *Bagwell*, 512 U.S. 821 (1994) 19
Kentucky v. *Graham*, 473 U.S. 159 (1985) 33
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 22
Michaelson v. *United States*, 266 U.S. 42 (1924) 19
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855) 18
Northern Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 18, 19
Ohio Envtl. Prot. Agency v. *United States*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000), appeal pending, No. 01-3215 (6th Cir.) 26
Paramino Lumber Co. v. *Marshall*, 309 U.S. 370 (1940) 20
Pennhurst State Sch. & Hosp. v. *Halderman*, 465 U.S. 89 (1984) 33
Plaquemines Port, Harbor & Terminal Dist. v. *FMC*, 838 F.2d 536 (D.C. Cir. 1988) 2, 3
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 20
Premo v. *Martin*, 119 F.3d 764 (9th Cir. 1997), cert. denied, 522 U.S. 1147 (1998) 25
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 34
Puerto Rico Ports Auth. v. *FMC*, 919 F.2d 799 (1st Cir. 1990) 2, 3
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Cases—Continued: Page

Ristow v. *South Carolina Ports Auth.*, 58 F.3d 1051 (4th Cir.), cert. denied, 516 U.S. 987 (1995) 7
Robinson, Ex parte, 86 U.S. (19 Wall.) 505 (1874) 19
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 23
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 8, 16, 34
Stark v. *Wickard*, 321 U.S. 288 (1944) 22
Tennessee Dep't of Human Servs. v. *United States Dep't of Educ.*, 979 F.2d 1162 (6th Cir. 1992) 25
Thomas v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) 23
Upshur County v. *Rich*, 135 U.S. 467 (1890) 16
Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 24
Weston v. *City of Charleston*, 27 U.S. (2 Pet.) 449 (1829) 15
Young, Ex parte, 209 U.S. 123 (1908) 30, 33
Young v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) 19

Constitution, statutes, regulations and rule:

U.S. Const.:
Art. II, § 2, Cl. 2 (Appointments Clause) 22
Art. II, § 3 23
Art. III 22, 24
Art. VI, Cl. 3 30
Amend. XI ..... *passim*
Amend. XIV, § 5 11
Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* 9
28 U.S.C. 2344 9
28 U.S.C. 2348 9
Clean Air Act, 42 U.S.C. 7622 6
Federal Water Pollution Control Act, 33 U.S.C. 1367 6
Shipping Act of 1984, 46 U.S.C. app. 1710 *et seq.*:
§ 10(b)(10), 46 U.S.C. app. 1709(b)(10) (Supp. V 1999) ... 7

In the Supreme Court of the United States

No. 01-46

FEDERAL MARITIME COMMISSION, PETITIONER

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 243 F.3d 165. The opinion of the Federal Maritime Commission (Pet. App. 27a-38a) is not officially reported. The opinion of the Administrative Law Judge (Pet. App. 39a-62a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2001. On May 21, 2001, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 10, 2001. The petition for a writ of certiorari was filed on that date and was granted on October 15, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 28 U.S.C. 2350(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

2. Section 11 of the Shipping Act of 1984 (Shipping Act), 46 U.S.C. app. 1710, is reprinted as an addendum to this brief (App., *infra*, 1a-4a).

STATEMENT

1. The Shipping Act of 1916 was designed to strengthen the United States shipping industry. See, *e.g.*, *Puerto Rico Ports Auth.* v. *FMC*, 919 F.2d 799, 806 (1st Cir. 1990); *Plaquemines Port, Harbor & Terminal Dist.* v. *FMC*, 838 F.2d 536, 542 (D.C. Cir. 1988). Congress determined that it was necessary to grant antitrust immunity to shipping cartels in order to enable the domestic shipping industry to survive and prosper in an international climate dominated by such cartels. See *Puerto Rico Ports Auth.*, 919 F.2d at 807. To prevent abuses of that immunity, the 1916 Act prohibited carriers from engaging in discriminatory practices. See *ibid.* Congress chose to subject maritime terminal facilities to the same non-discrimination requirements in order to effectuate regulation of the carriers. See *ibid.*; *Plaquemines*, 838 F.2d at 542-543.

The Shipping Act of 1916 applied to, *inter alia*, "any person * * * carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities." *California* v. *United States*, 320 U.S. 577, 585 (1944). In *California* v. *United States*, this Court held that state and local instrumentalities

engaged in the operation of terminal facilities were "person[s]" subject to the Shipping Act's substantive requirements. *Id.* at 585-586. The Court explained that "with so large a portion of the nation's dock facilities * * * owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *Ibid.*

The Shipping Act of 1916 was subsequently replaced by the Shipping Act of 1984. Section 10(d)(1) of the 1984 Act, 46 U.S.C. app. 1709(d)(1), "tracks the language of § 17 of the 1916 Act except that it substitutes the term 'marine terminal operator' for 'other person subject to this chapter'. The legislative history to the 1984 Act explains that the description of 'marine terminal operator' was taken directly from the 1916 Act's definition of 'other person subject to th[is] chapter'." *Puerto Rico Ports Auth.*, 919 F.2d at 801 (citing H.R. Rep. No. 53, 98th Cong., 2d Sess. Pt. 1, at 29 (1984)). In light of Congress's evident intent to maintain in effect the scope of the prior Act's coverage, the courts of appeals in construing the scope of federal regulatory authority under the 1984 Act have recognized that "the intent behind, and prior interpretations of, the 1916 Act's provisions have continuing precedential force." *Plaquemines*, 838 F.2d at 542; accord *Puerto Rico Ports Auth.*, 919 F.2d at 801.

2. Enforcement of the Shipping Act of 1984 is entrusted to the Federal Maritime Commission (FMC or Commission). The Act provides that "[a]ny person may file with the Commission a sworn complaint alleging a violation of this chapter * * * and may seek reparation for any injury caused to the complainant by that violation." 46 U.S.C. app. 1710(a). "The Commission

shall furnish a copy of a complaint filed pursuant to subsection (a) of this section to the person named therein who shall, within a reasonable time specified by the Commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied, the Commission shall investigate it in an appropriate manner and make an appropriate order." 46 U.S.C. app. 1710(b) (emphasis added). The Act further provides that "[t]he Commission, upon complaint or upon its own motion, may investigate any conduct or agreement that it believes may be in violation of this chapter." 46 U.S.C. app. 1710(c). To aid in investigating alleged violations, the Act authorizes the FMC to issue subpoenas directing the attendance of witnesses and the production of documents. See 46 U.S.C. app. 1711(a). The Act also authorizes the FMC to bring suit in federal district court to enjoin violations during the pendency of the agency proceedings. See 46 U.S.C. app. 1710(h)(1).[1]

Whether an investigation is undertaken on the FMC's own motion or prompted by the filing of a complaint, the FMC must provide an opportunity for a hearing before issuing an order relating to a Shipping Act violation or assessing penalties for such a violation. See 46 U.S.C. app. 1713(a); see also 46 U.S.C. app. 1710(g) (Supp. V 1999). The FMC must furnish to all parties a written report of any such investigation that states the FMC's conclusions, decisions, findings of fact, and its order. See 46 U.S.C. app. 1710(f). If an investigation is prompted by the filing of a formal complaint, the investigation takes the form of an adjudication. The FMC has delegated to administrative law judges

[1] The Act likewise permits a private complainant to sue in federal district court to enjoin a Shipping Act violation during the pendency of the FMC proceedings. See 46 U.S.C. app. 1710(h)(2).

(ALJs) the authority to make initial or recommended decisions. See 46 C.F.R. 502.223. The hearing before the ALJ is conducted in accordance with the provisions of the Administrative Procedure Act that govern adjudications. See 46 C.F.R. 502.142.

The FMC may review an ALJ decision, either on its own initiative or in response to a party's request. See 46 C.F.R. 502.227. If exceptions to an ALJ decision are filed, the decision becomes inoperative until the FMC decides the matter. See 46 C.F.R. 502.227(a)(5). In reviewing an ALJ decision, whether in response to exceptions or on its own initiative, the FMC has all of the powers that it would have in making the initial decision. See 46 C.F.R. 502.227(a)(6). If the FMC finds that a violation has occurred, it may issue a nonreparation order. See 46 U.S.C. app. 1710(b) and (f), 1713(c). If the investigation was prompted by the filing of a formal complaint, the FMC may also direct payment of reparation to the complainant. See 46 U.S.C. app. 1710(g) (Supp. V 1999).

3. Orders issued by the FMC are enforceable only by federal court order. The Shipping Act sets out the mechanisms by which FMC orders may be enforced.

The Shipping Act authorizes private parties to bring specified types of enforcement actions. The Act provides that "any party injured" by a violation of a nonreparation order or FMC subpoena "may seek enforcement by a United States district court having jurisdiction over the parties," 46 U.S.C. app. 1713(c), and it authorizes "the person to whom [a reparation award] was made" to seek enforcement of the order "in a United States district court having jurisdiction of the parties," 46 U.S.C. app. 1713(d)(1). The Act also authorizes the Attorney General of the United States to bring an action in federal district court to enforce

various categories of FMC orders, including nonreparation orders and subpoenas. See 46 U.S.C. app. 1713(c). The Act further provides that "the Attorney General at the request of the Commission may seek to recover the amount [of civil penalties] assessed in an appropriate district court of the United States." 46 U.S.C. app. 1712(e). The Act does not authorize the Attorney General to bring an action to enforce a reparation order.[2]

4. a. This proceeding began when South Carolina Maritime Services, Inc. (Maritime Services), a private company that operates vessels used for (*inter alia*) casino gambling, filed a complaint with the FMC. See Pet. App. 39a-41a. The complaint alleged that respondent South Carolina State Ports Authority had refused to give berthing space to a vessel owned by Maritime Services, based on a purported policy of refusing to berth ships whose primary purpose is gambling, while

[2] The private complaint proceeding authorized by the Shipping Act is not unique. A number of federal environmental statutes, for example, contain "whistleblower" provisions that prohibit retaliation against employees (including state employees, see note 10, *infra*) who commence or testify in proceedings, or who assist or participate in any manner in actions to carry out the purposes of the respective laws. See, *e.g.*, Federal Water Pollution Control Act, 33 U.S.C. 1367; Solid Waste Disposal Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622. Those provisions are enforced by the United States Department of Labor, which receives and adjudicates administrative complaints filed by persons claiming to be the victims of violations. Unlike the Shipping Act, however, which authorizes suits by the Attorney General to enforce nonreparation orders but does not authorize government suits to enforce reparation orders, the environmental whistleblower provisions uniformly authorize the Secretary of Labor and/or the United States to file suit to enforce any order issued at the conclusion of the administrative process.

providing berthing space to other vessels offering comparable gambling services. See *id.* at 40a.

Maritime Services alleged that by refusing to give berthing space to its vessel, respondent had violated the non-discrimination requirements of Section 10(b)(10) and (d)(4) of the Shipping Act of 1984, 46 U.S.C. app. 1709(b)(10) and (d)(4) (Supp. V 1999). See Pet. App. 41a. The complaint asked that the FMC issue an order compelling respondent to pay reparation and to cease and desist the alleged violations of federal law. See *ibid.* The complaint also asked the FMC to file suit against respondent to obtain a preliminary injunction. See *id.* at 41a n.1.

b. Respondent has previously been held to be an arm of the State of South Carolina protected by the State's sovereign immunity. Pet. App. 3a (citing *Ristow* v. *South Carolina Ports Auth.*, 58 F.3d 1051 (4th Cir.), cert. denied, 516 U.S. 987 (1995)). Respondent moved to dismiss the administrative complaint, invoking the State's Eleventh Amendment immunity. An ALJ granted the motion to dismiss. *Id.* at 39a-62a. The ALJ concluded that the principles of state sovereign immunity reflected in the Eleventh Amendment apply to private complaint proceedings against a state entity before a federal agency adjudicator. *Id.* at 59a-62a. The ALJ also suggested that a private complaint proceeding would in any event be futile, since a Shipping Act reparation order can be enforced only through a suit brought by "the person to whom the award was made," and a federal district court would lack jurisdiction if a private party brought such a suit against a state agency. *Id.* at 59a n.8. The ALJ noted, however, that "the Commission has the authority to look into allegations of Shipping Act violations and enforce the Shipping Act by means other than *private*

complaints," *id.* at 60a, including enforcement proceedings brought by the FMC itself, see *id.* at 60a-61a.

c. The FMC reversed. Pet. App. 27a-38a. The FMC stated that this Court "has defined the terms of state sovereign immunity, and this definition does not extend to administrative proceedings. All of the recent Supreme Court cases addressing state sovereign immunity involve proceedings against states in judicial tribunals, not before administrative agencies." *Id.* at 31a. After reviewing recent decisions of this Court addressing issues of state sovereign immunity, including *Alden* v. *Maine*, 527 U.S. 706 (1999), and *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the FMC concluded that

> [t]he doctrine of state sovereign immunity, even freed from the linguistic boundaries of the Eleventh Amendment, is meant to cover proceedings before judicial tribunals, whether Federal or state, not executive branch administrative agencies like the Commission. There is no compelling reason offered by either the ALJ or [the Ports Authority] to extend the reach of the Supreme Court's holdings in *Seminole Tribe* and *Alden*, and thereby nullify the Commission's jurisdiction over state ports, which jurisdiction has been in place for decades.

Pet. App. 33a.

The FMC also stated that "[a] private cause of action against an arm of the state brought before an administrative agency, because it invokes the remedial powers of the Executive branch, is in many respects more analogous to a Federal investigation than it is to a suit brought by a private party before a Federal or state court." Pet. App. 34a. It acknowledged that "[t]he Commission is also authorized to initiate investigations

on its own motion," but asserted that "Commission investigations, and private complaint proceedings, are part of a unified system of regulation created by Congress under the Shipping Act." *Ibid.*

The FMC also briefly addressed the question whether any reparation order it might issue at the conclusion of the administrative proceedings would be judicially enforceable in a suit brought by Maritime Services. The FMC expressed the view that the Eleventh Amendment would not bar such a suit because the action would be more analogous to a petition for review of an agency order than to a suit filed initially in the district court. Pet. App. 36a. The FMC also stated, however, that issuance of an order resolving the pertinent legal issues would be useful even if the order were ultimately held to be unenforceable, and that the ALJ therefore should not have dismissed the complaint based on the prediction that no enforceable order could result. *Id.* at 37a. The FMC explained, in that regard, that "Commission decisions in complaint cases, whether or not a reparations award is issued, serve as precedent in future complaint cases and investigations." *Ibid.*

5. Pursuant to the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, respondent filed a petition for review of the FMC's order in the United States Court of Appeals for the Fourth Circuit. The United States and the FMC filed separate briefs as parties in the court of appeals. See 28 U.S.C. 2344 and 2348.[3]

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[3] The United States and the FMC both argued in the court of appeals that the adjudicative proceedings before the FMC were not precluded by principles of state sovereign immunity. The federal parties disagreed, however, with respect to the enforceability of any reparation order that the FMC might ultimately enter. The United States took the position that the Eleventh Amendment would bar any attempt to enforce an FMC reparation

The court of appeals reversed the FMC's decision. Pet. App. 1a-25a. The court observed that, although the Eleventh Amendment refers specifically to "[t]he Judicial power of the United States," this Court in *Alden* had applied principles of state sovereign immunity to suits brought in state courts. *Id.* at 7a-8a. The court of appeals concluded that "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states" is constitutionally impermissible "whether the forum be a state court, a federal court, or a federal administrative agency." *Id.* at 13a.

The court of appeals observed that the FMC "investigation" that is triggered by the filing of a private complaint "takes the form of an adjudication" and is governed by rules very similar to those that apply to private lawsuits. Pet. App. 15a. The court stated that a complaint proceeding thus "walks, talks, and squawks very much like a lawsuit." *Ibid.* The court further observed that "the ALJ issues subpoenas, authorizes depositions, hears witnesses, and otherwise conducts the proceedings in a judicious manner," and it concluded on that ground that "[t]he ALJ is thus not merely an alternate means of policy implementation." *Id.* at 16a.

The court also rejected the contention that the FMC's lack of authority to enforce its own orders eliminated any Eleventh Amendment problem by giving a state defendant the practical ability to ignore the FMC proceedings. The court acknowledged that, "under the Act, a state may choose to ignore a subpoena, an order, or a judgment." Pet. App. 17a. The court concluded that sovereign immunity principles are nonetheless implicated because a judgment against a State "is a powerful thing, if not legally, then certainly politically." *Ibid.* The court stated that even an unenforceable default judgment might stigmatize the state entity; that the FMC's order could have tangible adverse effects on the State in a subsequent proceeding; and that state officials cannot properly be expected to ignore the directive of a federal official. *Id.* at 17a- 18a.[4]

order through a suit filed by the private complainant. See U.S. C.A. Br. 26-27. The FMC, by contrast, argued that a private enforcement suit is analogous to a request for judicial review of an administrative order and as such would not be precluded by the State's sovereign immunity. FMC C.A. Br. 41-42.

Because the United States was a party to the proceedings in the court of appeals, it is a respondent in this Court. See S. Ct. R. 12.6.

SUMMARY OF ARGUMENT

A. This Court has understood the Eleventh Amendment to be illustrative of a broader constitutional principle, and has upheld claims of state sovereign immunity in situations falling outside the Amendment's literal coverage. The Court has made clear, however, that the States remain obligated to obey properly applicable

[4] Having concluded that the same principles of sovereign immunity that apply in court suits also apply in agency proceedings, the court of appeals determined that the administrative adjudication at issue in this case does not fall within any of the recognized exceptions to state sovereign immunity. See Pet. App. 19a-22a. Thus, the court explained that respondent had not consented to be sued, *id.* at 19a; that the complaint had not been brought by the United States or another State, *id.* at 19a-21a; that the proceeding was not one brought pursuant to Congress's enforcement authority under Section 5 of the Fourteenth Amendment, *id.* at 21a; and that Maritime Services' claim had been brought against respondent itself rather than against state officers acting either in their official or individual capacities, *id.* at 21a-22a (see pp. 32-34, *infra*). Neither the United States nor the FMC had contested those points.

federal law and are immune only from a particular means of enforcement. The Court has consistently described the States' sovereign immunity as an immunity from private "suits" or from "judicial" action. The term "suit" has traditionally been used with reference to court proceedings and has not historically encompassed administrative adjudications.

B. The court of appeals erred in treating the FMC adjudication at issue here as the practical and constitutional equivalent of a suit in court. In decisions applying the "public rights" doctrine, this Court has long distinguished between controversies that must be decided by courts and those that may properly be committed to the Executive Branch. Although a court possesses inherent authority to punish contempts so as ensure compliance with its orders, administrative agencies have traditionally lacked the contempt power. Because the FMC lacks authority to enforce its own orders, its assertion of jurisdiction over Maritime Services' complaint does not pose the same threat to the State's financial integrity as a comparable exercise of jurisdiction by a federal court. Rather, application of immunity principles in any subsequent judicial proceeding adequately protects the State's ultimate authority to allocate public resources in the manner it sees fit. And unlike a court, whose essential function is to determine the rights of individuals, an Executive Branch agency's adjudication of private claims is simply one means by which it protects the public interest in faithful execution of the laws. The FMC's use of adjudication to further public ends does not cause the affront to state dignity that might be thought to follow from judicial proceedings whose underlying purpose is the vindication of a private right.

C. Before this Court's decision in *Alden*, the courts of appeals had consistently held that States enjoy no immunity in administrative proceedings because administrative tribunals do not exercise the "Judicial power." Nothing in *Alden* calls that understanding into question. *Alden* reflects the Court's determinations that (1) suits brought in state court can pose the same threat to a State's financial integrity as suits brought in federal court, and (2) recognition of a federal power to commandeer state courts over the State's objection would be a distinct affront to the State's sovereignty. Those concerns are inapplicable to proceedings before a federal administrative agency that lacks power to enforce its own orders.

D. The possibility that state officials might experience political pressure to comply with an adverse FMC order does not support the State's claim of immunity from the administrative proceeding. Consistent with principles of sovereign immunity, federal Executive or Legislative Branch officers may attempt to persuade or cajole state officials to govern in desired ways—just as state officials may similarly attempt to influence the operation of the national government. So long as state officers retain ultimate authority over the allocation of state resources, the possibility that the views or determinations of federal officials will influence political discourse within the State creates no constitutional infirmity. The court of appeals also erred in concluding that principles of federalism would effectively require state officials to comply with an FMC order. Although state officers are bound to obey federal *law*, they need not invariably accede to the views of the federal Executive Branch regarding the nature and extent of their legal obligations. Until any disagreement between state and federal Executive

Branch officers has been finally resolved by a court having jurisdiction over the parties, no constitutional principle bars state officials from acting on the basis of their own understanding of federal law.

E. Even if principles of state sovereign immunity precluded the FMC from issuing a reparation order against respondent, it would be inappropriate to order dismissal of Maritime Services' administrative complaint, which sought an order compelling cessation of alleged ongoing violations as well as monetary relief for prior economic losses. The State's sovereign immunity does not bar private suits in federal court seeking prospective injunctive relief against individual state officers alleged to be acting in violation of federal law. Although the plaintiff in such a suit must name individual officers (rather than the State or state agency itself) as defendants, there is no persuasive reason to import that pleading requirement into the administrative setting.

ARGUMENT

NEITHER THE ELEVENTH AMENDMENT NOR RELATED PRINCIPLES OF STATE SOVEREIGN IMMUNITY PRECLUDE THE FEDERAL MARITIME COMMISSION FROM ADJUDICATING A PRIVATE PARTY'S CLAIM THAT A STATE AGENCY HAS VIOLATED THE SHIPPING ACT OF 1984

A. The State's Sovereign Immunity Is An Immunity From Suit In Court And Does Not Extend To Adjudicative Proceedings Conducted By Non-Judicial Bodies

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in

law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This Court has viewed that constitutional provision as illustrative of a broader principle, and "has upheld States' assertions of sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment." *Alden* v. *Maine*, 527 U.S. 706, 727 (1999); see also, *e.g.*, *Hans* v. *Louisiana*, 134 U.S. 1, 15 (1890). Thus, the Court has found constitutional principles of state sovereign immunity to be applicable to federal-question suits against States brought by citizens of the defendant State, federal corporations, foreign nations, and Indian Tribes. See *id.* at 727-728. Most recently, this Court in *Alden* held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Id.* at 712; see *id.* at 712-757.

Although the Court has recognized state sovereign immunity in contexts falling outside the Eleventh Amendment's literal terms, the text still illuminates the focus of the Framers' concern. The Amendment's reference to "judicial Power" and to "any suit in law or equity" clearly mark it as an immunity from judicial process. The term "suit" has traditionally been used with reference to court proceedings. See, *e.g.*, *Weston* v. *City of Charleston*, 27 U.S. (2 Pet.) 449, 464 (1829) (Marshall, C.J.) ("The term ['suit'] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him."). In *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 408 (1821) (Marshall, C.J.), the Court stated, with specific reference to the Eleventh Amendment, that

"[b]y a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court." The term has not historically encompassed administrative adjudications. To the contrary, this Court has observed that "a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, * * * is purely administrative in character, and cannot, in any just sense, be called a suit." *Upshur County* v. *Rich*, 135 U.S. 467, 477 (1890).

This Court in its sovereign immunity jurisprudence has endeavored to "strike[] the proper balance between the supremacy of federal law and the separate sovereignty of the States." *Alden*, 527 U.S. at 757. In articulating that balance, this Court has consistently described the States' sovereign immunity as an immunity from "suits" or from "judicial" action. See, *e.g.*, *id.* at 712 (Congress lacks power "to subject nonconsenting States to private suits for damages in state courts"); *id.* at 713 ("the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution"); *id.* at 715 (Framers "considered immunity from private suits central to sovereign dignity"); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 58 (1996) (Eleventh Amendment serves in part to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties"); *id.* at 72 ("the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States"). The Court has thus accorded the States an immunity from a mode of enforcement deemed particularly disruptive of state sovereignty, but it has emphasized both the States' obligation to obey valid federal law, *id.* at

754-755, and the need for alternative enforcement mechanisms sufficient to ensure compliance, *id.* at 755-757. Recognition of a state immunity from privately-initiated Executive Branch adjudications would abandon the text of the Eleventh Amendment altogether and would disrupt the balance between state and federal interests reflected in this Court's current jurisprudence.

B. An FMC Adjudication Differs Significantly, In Respects Directly Relevant To The Sovereign Immunity Inquiry, From A Suit In Court

Despite this Court's consistent characterization of the States' sovereign immunity as an immunity from "suits," the court of appeals concluded that "[w]hether the proceeding is formally called an administrative action, a lawsuit, or an adjudication does not matter." Pet. App. 14a. Rather, the court found dispositive the fact that the FMC proceeding at issue here "requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state." *Ibid.* The court's apparent view was that no practical or constitutional distinction (or, at least, no distinction relevant to the sovereign immunity inquiry) exists between judicial proceedings and adjudications conducted by administrative bodies. That view is erroneous.

1. In decisions applying the "public rights" doctrine, this Court has long recognized that administrative adjudication may share some features of a judicial proceeding without becoming judicial action.[5] The public

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[5] Cf. *Freytag* v. *Commissioner*, 501 U.S. 868, 909 (1991) (Scalia, J., concurring in part and concurring in the judgment) (explaining that federal agencies commonly "'adjudicate,' i.e., they determine facts, apply a rule of law to those facts, and thus arrive at a de-

rights doctrine is grounded "in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently * * * judicial.'" *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). Application of the doctrine involves examination of the law of the States and of England at the time of the framing of the Constitution to identify those disputes that can properly be resolved only by a tribunal wielding judicial power. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-285 (1855). The distinction between controversies that must be decided by courts and those that may properly be committed to the Executive Branch is thus as old as the Constitution itself.[6]

2. The Framers' particular concern that private "suits" might disrupt state activities reflects distinctive features of the judicial power. A defining characteristic of a judicial proceeding is that it culminates in a *judgment* enforceable by the court that entered it. "The

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cision. But there is nothing 'inherently judicial' about 'adjudication' ").

[6] The public rights doctrine is not limited to disputes in which the government is a party. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 54 (1989) ("In our most recent discussion of the 'public rights' doctrine as it bears on Congress' power to commit adjudication of a statutory cause of action to a non-Article III tribunal, we rejected the view that a matter of public rights must at a minimum arise between the government and others.") (citations and internal quotation marks omitted); see also *CFTC* v. *Schor*, 478 U.S. 833 (1986) (upholding power of the Commodity Futures Trading Commission to entertain state law counterclaims in reparation proceedings).

award of execution * * * is a part, and an essential part, of every judgment, passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it." *ICC* v. *Brimson*, 154 U.S. 447, 484 (1894) (quoting Chief Justice Taney's memorandum in *Gordon* v. *United States*, 117 U.S. 697, 702 (1864)); see *Northern Pipeline*, 458 U.S. at 86 n.38 (plurality opinion). "From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt." *Brimson*, 154 U.S. at 489; accord, *e.g.*, *International Union* v. *Bagwell*, 512 U.S. 821, 831 (1994) (describing the contempt power as an "inherent" power of all courts "necessary to the exercise of all others"); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798 (1987); *Michaelson* v. *United States*, 266 U.S. 42, 65-66 (1924); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874).

By contrast, administrative agencies have traditionally lacked authority to utilize the contempt power to compel obedience to their orders. The Court in *Brimson* explained that

> the question of punishing the defendants for contempt could not arise before the [Interstate Commerce] Commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the Circuit Court, is determined adversely to the defendants and they refuse to obey, not the order of the commission, but the final order of the court.

154 U.S. at 488-489. Consistent with that traditional principle, neither the FMC nor its delegees possess the

contempt power, and their decisions can be enforced only in a federal district court "having jurisdiction over the parties." 46 U.S.C. app. 1713(c) and (d).[7]

That distinction between judicial and administrative proceedings is directly relevant to the practical concerns that underlie the States' immunity from private suits, and highlights the impropriety of extending that immunity to administrative tribunals. The Court in *Alden* explained that a State if subject to suit without its consent "must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf." 527 U.S. at 749. The Court further observed that "[w]hile the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc." *Id.* at 751. It concluded that "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Ibid.*

Because the FMC lacks authority to enforce its own orders or to hold parties in contempt, its assertion of jurisdiction over Maritime Services' administrative

[7] Administrative orders also differ from court judgments in that the former, but not the latter, may be superseded by Congress even after the time for appeal has expired. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995); *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 381 & n.25 (1940).

complaint does not pose the same threat to the State's financial integrity as a comparable exercise of jurisdiction by a federal court. Any directive the FMC might issue could be enforced only by an order of a federal court; and any suit to obtain such an order would of course be subject to the limitations imposed by the Eleventh Amendment and related principles of state sovereign immunity. Application of those principles in any subsequent court proceeding adequately protects the State's ultimate authority to allocate public resources in the manner it sees fit. Because the Eleventh Amendment would preclude a district court from exercising jurisdiction over a nonconsenting State in an enforcement action brought by a private party, the FMC's determination that a state entity has violated the Shipping Act cannot be used in furtherance of a private suit for monetary relief.

Permitting the FMC to entertain private complaints against state-operated terminal facilities would not, as the court of appeals believed, allow Congress to effectuate an "end-run around the Constitution." Pet. App. 13a. We may assume, arguendo, that state sovereign immunity principles would apply to proceedings before a body formally located within the Executive Branch but possessing the attributes—*e.g.*, a purely adjudicative function, coupled with the power to punish contempts—traditionally associated with courts. But where (as here) the administrative agency adjudicates private complaints as part of a larger regulatory mission, and lacks the power to enforce its own orders, the concerns that underlie state sovereign immunity from private suits are not implicated.[8]

[8] In *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), the Court concluded that the Tax Court should be regarded, for purposes of

3. Under Article III of the Constitution, "Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights." *Stark* v. *Wickard*, 321 U.S. 288, 310 (1944).

> "The province of the court," as Chief Justice Marshall said in *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803), "is solely, to decide on the rights of individuals." Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.

Lujan v. *Defenders of Wildlife*, 504 U.S. 555, 576 (1992). Although judicial action may indirectly serve public purposes, as by clarifying the applicable law and deterring future violations of it, such effects are incidental byproducts of the courts' performance of their core function.

The administrative adjudication at issue in this case rests on a quite different constitutional footing. A federal agency may rely on the filing of a private complaint to inform it of a possible violation and to trigger its investigative machinery, and it may utilize an adversary process to develop the evidence that allows it to determine whether a violation has occurred. Resolution of disputes between discrete regulated entities,

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the Appointments Clause, as one of the "Courts of Law." The Court explained that the Tax Court "exercises judicial power to the exclusion of any other function," *id.* at 891, and it stressed that "[t]he Tax Court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions," *id.* at 892. The Court further emphasized that the Tax Court has the power of contempt. See *id.* at 891; compare *CFTC* v. *Schor*, 478 U.S. 833, 853 (1986) (concluding that agency was not wielding judicial power because, *inter alia*, the agency's orders were "enforceable only by order of the district court").

however, is not the FMC's overriding objective, but simply one means by which the agency fulfills the responsibility of the Executive Branch to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. See Pet. App. 34a (FMC explains that "Commission investigations, and private complaint proceedings, are part of a unified system of regulation created by Congress under the Shipping Act.").

This Court has recognized that an administrative agency "must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective," and that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). In the context of administrative adjudications, the distinction between privately initiated actions and actions prosecuted by the government itself—a distinction that is crucial in determining the scope of a State's susceptibility to suit in court, see, *e.g.*, *Alden*, 527 U.S. at 755-756—is unilluminating. Because an adjudication forms part of the agency's responsibility to enforce the law, an agency may conduct such a proceeding only where the private right to be enforced "is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985).

In the present case, for example, the FMC acknowledged the possibility that any effort to enforce a reparation order against respondent by means of a private suit might ultimately be held to violate the Eleventh Amendment. Pet. App. 36a-37a. It determined, however, that "even if a court were to rule that a Com-

mission reparations award is unenforceable, the issuance of an order finding violations of the Shipping Act is not futile." *Id.* at 37a. The FMC observed in that regard that "Commission decisions in complaint cases, whether or not a reparations award is issued, serve as precedent in future complaint cases and investigations." *Ibid.* That precedent would guide the FMC not only in adjudicating future private complaints, but also in other contexts, such as FMC-initiated enforcement actions, where the FMC has an undisputed ability to regulate the conduct of States. Unlike an Article III court, which may issue pronouncements of law "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy," *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)), an Executive Branch agency may self-consciously employ the resolution of individual disputes as a means of furthering the public interest in the clarification and long-term enforcement of statutes entrusted to its administration. The FMC's use of adjudication to further those public ends does not cause the affront to state dignity that might be thought to follow from judicial proceedings whose underlying purpose is the vindication of a private right.

C. This Court's Decision In *Alden* Does Not Suggest That States Are Immune From Adjudicative Proceedings Of A Non-Judicial Character

Before this Court's decision in *Alden*, the courts of appeals had consistently held that States enjoy no immunity in administrative proceedings because administrative tribunals do not exercise the "Judicial power." See *Premo* v. *Martin*, 119 F.3d 764, 769 (9th

Cir. 1997) (Eleventh Amendment "does not purport to affect proceedings in tribunals established by statute"), cert. denied, 522 U.S. 1147 (1998); *Tennessee Dep't of Human Servs.* v. *United States Dep't of Educ.*, 979 F.2d 1162, 1167 (6th Cir. 1992) ("[c]ourts have found no eleventh amendment bar to actions brought by federal administrative agencies pursuant to complaints of private individuals") (quoting *Ellis Fischel State Cancer Hosp.* v. *Marshall*, 629 F.2d 563, 567 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981)); *Ellis Fischel*, 629 F.2d at 567 ("The eleventh amendment bars *judicial* action, not action by Congress or the executive branch."); *Delaware Dep't of Health & Soc. Servs.* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (rejecting, in dictum, the contention that the Eleventh Amendment has "any possible application to proceedings before arbitrators"); but see *Hensel* v. *Office of Chief Admin. Hearing Officer*, 38 F.3d 505, 510 (10th Cir. 1994).[9] Since *Alden*, however, the court

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[9] The claimant in *Hensel* alleged employment discrimination on the part of a state agency, received an adverse ruling from a federal ALJ, and sought judicial review in the court of appeals. The state agency argued that the Eleventh Amendment precluded both the ALJ and the court of appeals from exercising jurisdiction. 38 F.3d at 508. The court's Eleventh Amendment analysis appeared to focus primarily on the state agency's immunity from suit in court. *Id.* at 508-509; see *id.* at 509 ("States and state agencies retain their immunity against all suits in federal court. Consequently, no federal jurisdiction exists and [Hensel's] claim * * * is barred.") (citation and internal quotation marks omitted). In the penultimate paragraph of its opinion, however, the court stated that "[t]he ALJ lacked jurisdiction to hear [Hensel's] claim[]" because the state agency was "protected by the doctrine[] of Eleventh Amendment immunity." *Id.* at 510. The court did not otherwise discuss the question whether principles of state sovereign immunity apply to administrative adjudications. The court of

of appeals in this case and several district courts have concluded that constitutional principles of state sovereign immunity bar Executive Branch officials from adjudicating claims brought by private parties against unconsenting States.[10] In the present case, the court of appeals read *Alden* to bar "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states." Pet. App. 13a.

In *Alden*, this Court held that Congress may not require a State to submit to private suits for money damages brought in the State's own courts. The Court explained that "[p]rivate suits against nonconsenting States * * * present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' * * * regardless of the forum." 527 U.S. at 749 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). The Court further observed that "[i]n some ways * * * a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal

appeals also stated that sovereign immunity barred the ALJ from exercising jurisdiction over Hensel's claim against a federal agency, see *ibid.*, because Hensel "ha[d] not demonstrated that the [relevant statute] contain[ed] explicit and unambiguous language that waives the immunity of the United States," *id.* at 509.

[10] See *Connecticut Dep't of Envtl. Protection* v. *OSHA*, 138 F. Supp. 2d 285 (D. Conn. 2001), appeal pending, No. 01-6217 (2d Cir.); *Florida* v. *United States*, 133 F. Supp. 2d 1280 (N.D. Fla. 2001), appeal pending, No. 01-12380-HH (11th Cir.); *Ohio Envtl. Prot. Agency* v. *United States*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000), appeal pending, No. 01-3215 (6th Cir.); *Rhode Island Dep't of Envtl. Mgmt.* v. *United States*, 115 F. Supp. 2d 269 (D.R.I. 2000), appeal pending, No. 01-1543 (1st Cir.); see also note 2, *supra*.

forum," because "[a] power to press a State's own courts into federal service to coerce the other branches of the State * * * is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." *Ibid.* It also noted that "[p]rivate suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States," and that "an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States * * * could create staggering burdens." *Id.* at 750.

In sustaining Maine's claim of immunity from suits brought in its own courts, which do not exercise "[t]he Judicial power of the United States," the Court in *Alden* reaffirmed the established principle (see p. 15, *supra*) that the scope of a State's immunity from private suits is not defined solely by the literal terms of the Eleventh Amendment. Rather, the Court has understood the Eleventh Amendment as illustrative of a broader constitutional "postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention." *Alden*, 527 U.S. at 730 (internal quotation marks omitted). Nothing in *Alden* suggests, however, that the Eleventh Amendment or the sovereign immunity principles reflected therein limit something other than the "judicial power" to decide "suit[s]."

The court of appeals therefore erred in reading *Alden* to establish a rule of immunity so broad as to cover every adjudicative proceeding involving an unconsenting State. *Alden* reflects the Court's determinations that (1) suits brought in *state court* can pose

the same threat to a State's financial integrity as suits brought in federal court, and (2) recognition of a federal power to commandeer *state courts* over the State's objection would be a distinct affront to the State's sovereignty. *Alden* extended Eleventh Amendment principles vertically (on the federalism axis) to cover *state* court proceedings. *Alden* did not in any way extend Eleventh Amendment principles horizontally (on the separation-of-powers axis) to suggest that non-judicial proceedings would be covered. Because the FMC proceedings at issue here differ in significant respects from suits brought in court (see pp. 17-24, *supra*), there is no basis for concluding that the rule announced in *Alden* properly applies to the present context. And to the extent that *Alden* rested on the impropriety of commandeering a State's own courts over the State's objection, its reasoning is wholly inapplicable to proceedings before a federal administrative agency.

D. Because State Officials Retain Legal Authority Over The Allocation Of State Funds Unless And Until An FMC Order Is Enforced By A Court, The Administrative Proceeding Does Not Infringe The State's Sovereign Immunity

The court of appeals acknowledged that "under the [Shipping] Act, a state may choose to ignore a subpoena, an order, or a judgment." Pet. App. 17a. It concluded, however, that the FMC proceedings nevertheless effect an impermissible intrusion on the State's sovereignty because "a judgment or a subpoena against a state is a powerful thing, if not legally, then certainly politically. All parties, and certainly political entities such as states, have an interest in avoiding the stigma

that attaches even to an unenforceable default judgment." *Ibid.*

That analysis is misconceived. Consistent with principles of sovereign immunity, federal Executive Branch officers may attempt to persuade or cajole state officials to govern in desired ways—just as state officials may similarly attempt to influence the operation of the national government. A Presidential declaration that particular state conduct disserves the national interest, for example, would surely be "a powerful thing * * * politically," Pet. App. 17a, but no one would contend that such a declaration infringes the State's immunity. The same analysis would apply to a joint resolution of Congress condemning a State's activities. The rule announced in *Alden* serves in part to ensure that decisions regarding the allocation of state resources will "be reached after deliberation by the political process established by the citizens of the State," rather than mandated "by judicial decree." 527 U.S. at 751. But so long as state officers retain ultimate authority in such matters, the possibility that the views of federal officials will influence political discourse within the State is fully consistent with the constitutional design. See *id.* at 755 (noting that the federal government may, "subject to constitutional limitations, * * * seek the State's voluntary consent to private suits").[11]

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[11] The court of appeals also expressed concern that if the FMC were permitted to issue a reparation order in a private complaint proceeding against a state entity, it might then attempt to induce payment by imposing civil penalties for non-compliance. Pet. App. 17a; see 46 U.S.C. app. 1712(a) (authorizing FMC to impose civil penalties for violations of its orders); 46 U.S.C. app. 1712(e) (authorizing Attorney General to file suit to enforce penalties). But while the FMC has taken the view that a reparation order against a state entity would be enforceable by means of a private

Likewise, when a federal court grants prospective injunctive relief against individual state officials under *Ex parte Young*, 209 U.S. 123 (1908), the practical import of its decision often is to declare unlawful an ongoing course of state conduct. Cf. *Edelman* v. *Jordan*, 415 U.S. 651, 662-678 (1974) (federal court may compel future compliance with federal public benefits law, even where compliance necessarily entails the expenditure of state funds, but may not compel state officials to pay benefits that ought to have been paid in the past). Such a ruling could in turn create political pressure on state officials to provide remedies to prior victims of the illegal practice. But so long as the relief legally compelled by judicial order is limited to appropriate prospective remedies, the possibility of such indirect effects on state behavior implicates no constitutional concern.

The court of appeals likewise erred in concluding (Pet. App. 18a) that principles of federalism would effectively require state officials to comply with an FMC order. The court of appeals correctly observed that "[s]tate officers, no less than federal ones, take an oath to support and defend the Constitution and the laws of the United States." *Ibid.*; see U.S. Const. Art. VI, Cl. 3; *Alden*, 527 U.S. at 754-755. The fact that state officials must obey federal *law*, however, does not mean that they must invariably accede to the views of federal *officers* regarding the nature and extent of the

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suit, see Pet. App. 36a-37a, it has not indicated whether a penalty proceeding against a State for non-compliance with a reparation order would be either a permissible or an appropriate exercise of administrative authority. The theoretical possibility of such a proceeding—which can separately be addressed when and if it occurs—is a wholly inadequate basis for pretermitting the FMC's investigative process at its inception.

State's legal obligations. In observing that the States have consented to suits brought by the federal government, see, *e.g.*, *Alden*, 527 U.S. at 755-756, this Court has necessarily contemplated that state and federal officials might have divergent understandings of the State's legal duties, and that States might legitimately decline to acquiesce in the pronouncements of the federal Executive Branch. Until such a disagreement has been finally resolved by a court having jurisdiction over the parties, no constitutional principle bars state officials from acting on the basis of their own interpretation of federal law.

The court of appeals also attached significance to the fact that in resolving private complaints, the FMC employs an adversary process bearing a significant formal resemblance to a lawsuit. See Pet. App. 14a-16a. But if an FMC reparation or nonreparation order against a state entity is an otherwise appropriate exercise of executive power, the agency's use of a structured decisionmaking process that facilitates input from interested persons cannot render the order unconstitutional. If federal officials contemplated the filing of a lawsuit against a State, for example, they could surely invite submissions (including legal argument) from the State and others addressing the question whether such a suit should be brought. Neither the federal government's use of such a process, nor the State's strong practical incentive to participate, would infringe the State's immunity or transform the ultimate decision to file the lawsuit into something other than an executive act.[12]

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[12] As Professor Bator explained:

> Every time an official of the executive branch, in determining how faithfully to execute the laws, goes through the process of

E. Even If Principles Of State Sovereign Immunity Precluded The FMC From Issuing A Reparation Order Against Respondent, The Administrative Complaint Filed In This Case Would Not Be Subject To Dismissal

For the foregoing reasons, constitutional principles of state sovereign immunity would not foreclose the FMC from issuing a reparation order against respondent. But even if such an order were precluded, the court of appeals' disposition of this case would be incorrect. Maritime Services' administrative complaint requested "an order compelling [respondent] to cease and desist from the * * * alleged violations" in addition to monetary relief for prior economic losses. Pet. App. 41a. If Maritime Services had filed suit in federal district court, the Eleventh Amendment would not have barred its request for a cease-and-desist order so long as individual state officers rather than the state agency itself had been named as defendants. Under the doctrine of *Ex parte Young*, official-capacity suits arising under federal law and seeking prospective injunctive

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finding facts and determining the meaning and application of the relevant law, he is doing something which functionally is akin to the exercise of judicial power. * * * Of course, many such executive determinations are informal. But it is only a step—and one quite consistent with the ideal of "faithful" execution of the laws—from informal, implicit adjudication to the notion that in making these determinations the official should hear the parties, make a record of the evidence, and give explicit formulations to his interpretation of the law.

P. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 264 (1990). The court of appeals' observation that the FMC proceeding at issue in this case "walks, talks, and squawks very much like a lawsuit," Pet. App. 15a, is therefore not helpful in resolving the constitutional question presented here.

relief are permitted to go forward against state officers, notwithstanding the fact that such suits "generally represent only another way of pleading an action against the entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985).[13]

Notwithstanding Maritime Services' request for prospective non-monetary relief, the court of appeals ordered that the administrative complaint be dismissed in its entirety. The court of appeals' disposition of the case necessarily reflects the view that the pleading requirements (as well as the limitations on substantive relief) governing lawsuits against state entities apply with equal force in administrative adjudications. That view is incorrect. In *Seminole Tribe*, the Court explained that "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity" because the Eleventh Amendment serves in part "to avoid 'the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of

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[13] The original rationale for the rule announced in *Ex parte Young* was that a state official who behaves in an unconstitutional manner is thereby "stripped of his official or representative character," and that a suit to compel compliance with the Constitution is for that reason properly regarded as one against the individual officer rather than against the State. *Ex parte Young*, 209 U.S. at 160. The Court has since recognized, however, that in official-capacity suits the distinction between the officer and the State posited in *Ex parte Young* is essentially a fiction, see *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269-270 (1997); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 114 n.25 (1984), and that the more persuasive justification for permitting suits for prospective relief to go forward is that they play a crucial role in ensuring the supremacy of federal law, without imposing costs on state treasuries for past violations. See *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst*, 465 U.S. at 104-105; see also *Coeur d'Alene*, 521 U.S. at 293 (opinion of O'Connor, J.).

private parties.'" 517 U.S. at 58 (quoting *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). Because the FMC is not a "judicial tribunal[]" and does not exercise "coercive process," that concern is inapplicable here. There is, accordingly, no persuasive reason why the state entity that is subject to the Commission's regulatory authority may not itself be made a party to the administrative proceeding. Thus, even if the court of appeals were correct in holding that principles of state sovereign immunity bar the FMC from issuing a reparation order against a state entity, the court's order directing dismissal of the administrative complaint would be erroneous.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

46 U.S.C. app. 1710 provides:

§ 1710. Complaints, investigations, reports, and reparations

(a) Filing of complaints

Any person may file with the Commission a sworn complaint alleging a violation of this chapter, other than section 1705(g) of this Appendix, and may seek reparation for any injury caused to the complainant by that violation.

(b) Satisfaction or investigation of complaints

The Commission shall furnish a copy of a complaint filed pursuant to subsection (a) of this section to the person named therein who shall, within a reasonable time specified by the Commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied, the Commission shall investigate it in an appropriate manner and make an appropriate order.

(c) Commission investigation

The Commission, upon complaint or upon its own motion, may investigate any conduct or agreement that it believes may be in violation of this chapter. Except in the case of an injunction granted under subsection (h) of this section, each agreement under investigation under this section remains in effect until the Commission issues an order under this subsection. The Commission may by order disapprove, cancel, or modify any agreement filed under section 1704(a) of this Appendix that operates in violation of this chapter. With respect to agreements inconsistent with section

1705(g) of this Appendix, the Commission's sole remedy is under section 1705(h) of this Appendix.

(d) Conduct of investigation

Within 10 days after the initiation of a proceeding under this section, the Commission shall set a date on or before which its final decision will be issued. This date may be extended for good cause by order of the Commission.

(e) Undue delays

If, within the time period specified in subsection (d) of this section, the Commission determines that it is unable to issue a final decision because of undue delays caused by a party to the proceedings, the Commission may impose sanctions, including entering a decision adverse to the delaying party.

(f) Reports

The Commission shall make a written report of every investigation made under this chapter in which a hearing was held stating its conclusion, decisions, findings of facts, and order. A copy of this report shall be furnished to all parties. The Commission shall publish each report for public information, and the published report shall be competent evidence in all courts of the United States.

(g) Reparations

For any complaint filed within 3 years after the cause of action accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation

of this chapter plus reasonable attorney's fees. Upon a showing that the injury was caused by activity that is prohibited by section 1709(b)(5) or (7) of this Appendix or section 1709(c)(1) or (3) of this Appendix, or that violates section 1709(a)(2) or (3) of this Appendix, the Commission may direct the payment of additional amounts; but the total recovery of a complainant may not exceed twice the amount of the actual injury. In the case of injury caused by an activity that is prohibited by section 1709(b)(6)(A) or (B) of this Appendix, the amount of the injury shall be the difference between the rate paid by the injured shipper and the most favorable rate paid by another shipper.

(h) Injunction

(1) In connection with any investigation conducted under this section, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the issues under investigation. Any such suit shall be brought in a district in which the defendant resides or transacts business.

(2) After filing a complaint with the Commission under subsection (a) of this section, the complaint may filed suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to

exceed 10 days after the Commission has issued an order disposing of the complaint. Any such suit shall be brought in the district in which the defendant has been sued by the Commission under paragraph (1); or, if no suit has been filed, in a district in which the defendant resides or transacts business. A defendant that prevails in a suit under this paragraph shall be allowed reasonable attorney's fees to be assessed and collected as part of the cost of the suit.

No. 01-46

Supreme Court, U.S.
FILED
JAN 11 2002

IN THE
Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE SOUTH CAROLINA STATE PORTS AUTHORITY

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QUESTION PRESENTED

The principle that a private party cannot sue a sovereign without its consent has been universally established and accepted since before the founding of our Nation. The States' retention of their sovereign immunity was essential to their ratification of the Constitution, which created our dual system of government. In this case, the United States Court of Appeals for the Fourth Circuit rejected a federal administrative agency's claim that it has the power to adjudicate a private suit against a nonconsenting state.

This case presents the following question:

> Whether a nonconsenting state is entitled to assert its sovereign immunity from a private suit for specific relief and damages filed with a federal administrative tribunal.

LIST OF PARTIES

All parties are identified in the caption, except the United States is a respondent here and was also a respondent before the United States Court of Appeals for the Fourth Circuit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. THE DOCTRINE OF SOVEREIGN IMMUNITY BARS THE COMMISSION FROM ADJUDICATING A SUIT FILED BY A PRIVATE PARTY AGAINST A NON-CONSENTING STATE.	9
A. *Alden* and *Seminole Tribe* compel the conclusion that the States' sovereign immunity applies in private suits before federal administrative tribunals.	9
1. The States retain their constitutional right to assert their sovereign immunity from private suits, regardless of the forum in which the action is brought.	10
2. Congress cannot use its Article I powers to circumvent the constitutional limitations on the States' amenability to suit.	12

TABLE OF CONTENTS—Continued

Page

B. History, practice, precedent and the structure of the Constitution demonstrate that the doctrine of sovereign immunity, embodied in the Eleventh Amendment, applies to federal administrative proceedings. 15

1. History 16

2. Practice 18

3. Precedent 20

4. Constitutional Structure 22

II. THE STATES ARE ENTITLED TO ASSERT THEIR SOVEREIGN IMMUNITY ON THE SAME TERMS AS THE UNITED STATES... 24

A. The sovereign immunity enjoyed by the federal and state governments are concurrent. 25

B. The Court's precedent establishes that the federal government's sovereign immuneity applies to private suits before federal administrative tribunals. 27

C. The United States has asserted its sovereign immunity in federal administrative proceedings. 28

III. THE COMMISSION'S ARGUMENTS FAIL TO SUPPORT STRIPPING THE STATES OF THEIR SOVEREIGN IMMUNITY IN PRIVATE SUITS BEFORE FEDERAL ADMINISTRATIVE AGENCIES..... 31

TABLE OF CONTENTS—Continued

Page

A. When adjudicating a private complaint, federal administrative agencies exercise the judicial power of the United States..... 32

B. The Commission's adversarial adjudication of private complaints against a state clearly implicates the state's sovereign immunity. 34

1. A private complaint filed with the Commission initiates a suit within the scope of the doctrine of sovereign immunity. 34

2. The Commission's lack of independent enforcement powers does not affect the States' sovereign immunity. 37

C. Allowing the commission to adjudicate private party complaints against a nonconsenting state would improperly raise up proceedings which were "anomalous or unheard-of" when the Constitution was adopted. 39

D. The public rights doctrine does not affect the States' sovereign immunity. 41

IV. NONE OF THE EXCEPTIONS TO STATE SOVEREIGN IMMUNITY RECOGNIZED BY THIS COURT APPLIES IN THIS CASE 43

A. Congress did not abrogate the States' immunity in the Shipping Act. 44

TABLE OF CONTENTS—Continued

	Page
1. The Shipping Act contains no clear expression of congressional intent to abrogate the States' immunity.	44
2. The Shipping Act would not constitute a valid exercise of Congress' abrogation power.	46
B. No other recognized exception to sovereign immunity applies in this case	46
C. The federal interest in uniform regulation of maritime matters does not support an additional exception to the States' constitutional right to sovereign immunity	47
CONCLUSION	50
APPENDIX	1a

TABLE OF AUTHORITIES

CASES

	Page
Alden v. Maine, 527 U.S. 706 (1999)	*passim*
American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828)	13
Beers v. Arkansas, 61 U.S. (20 How.) 527 (1857)	11, 20
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)	16, 23, 31, 37, 44
Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001)	44
Butz v. Economou, 438 U.S. 478 (1978)	35, 36
California v. United States, 320 U.S. 577 (1944)	49
Chisholm v Georgia, 2 U.S. (2 Dall.) 419 (1793)	17, 20, 26
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)	20, 24, 36
College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999)	19
Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986)	42
Crowell v. Benson, 285 U.S. 22 (1932)	42
Cunningham v. Macon & Brunswick Railroad Co., 109 U.S. 446 (1883)	11, 21, 26
Dellmuth v. Muth, 491 U.S. 223 (1989)	44
Dugan v. Rank, 372 U.S. 609 (1963)	29, 30
Edelman v. Jordan, 415 U.S. 651 (1974)	17
Ex parte Ayers, 123 U.S. 443 (1887)	22
Ex parte Bakelite Corp., 279 U.S. 438 (1929)	33
Ex parte Young, 209 U.S. 123 (1908)	47
FDIC v. Meyer, 510 U.S. 471 (1994)	30
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)	46
Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982)	47

TABLE OF AUTHORITIES—Continued

	Page
Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999)	46
Ford Motor Corp. v. Department of Treasury, 323 U.S. 459 (1945)	36
Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991)	13, 15, 32-34
Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944)	39
Gregory v. Ashcroft, 501 U.S. 452 (1991)	18, 24
Hans v. Louisiana, 134 U.S. 1 (1890)	*passim*
Harris v. McRae, 448 U.S. 297 (1980)	14
Hensel v. Office of the Chief Administrative Hearing Officer, 38 F.3d 505 (10th Cir. 1994)	6, 29, 30
Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991)	32
In re New York, 256 U.S. 490 (1921)	47, 48
Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)	12, 44, 46
Land v. Dollar, 330 U.S. 731 (1947)	29, 30
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)	30
Monaco v. Mississippi, 292 U.S. 313 (1934)	17, 23
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)	47
Nevada v. Hall, 440 U.S. 410 (1979)	17, 22, 40, 41
Nichols v. United States, 74 U.S. (7 Wall.) 122 (1868)	11, 20, 26
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	43
NVR Homes, Inc. v. Clerks of the Circuit Court for Anne Arundel County (In re NVR, LP), 189 F.3d 442 (4th Cir. 1999), *cert. denied*, 528 U.S. 117 (2000)	35, 36, 43

TABLE OF AUTHORITIES—Continued

	Page
Palmore v. United States, 411 U.S. 389 (1973)	13
Parden v. Terminal Railway of the Alabama State Docks Department, 377 U.S. 184 (1964), *overruled by College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), and *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987)	18, 19
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), *overruled by Seminole Tribe v. Florida*, 517 U.S. 44 (1996)	18
Printz v. United States, 521 U.S. 898 (1997)	16-19
Ristow v. South Carolina Ports Authority, 58 F.3d 1051 (4th Cir. 1995)	5, 46, 47
Seminole Tribe v. Florida, 517 U.S. 44 (1996)	*passim*
South Carolina State Ports Authority v. Federal Maritime Commission, 243 F.3d 165 (4th Cir. 2001)	*passim*
Tafflin v. Levitt, 493 U.S. 455 (1990)	20, 25
Texas v. Walker, 142 F.3d 813 (5th Cir. 1998)	43
The Siren, 74 U.S. (7 Wall.) 152 (1868)	26
Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985)	41, 42
United States v. Clarke, 33 U.S. (8 Pet.) 436 (1834)	20
United States v. Lee, 106 U.S. 196 (1882)	26
United States v. O'Keefe, 78 U.S. (11 Wall.) 178 (1870)	26
United States v. Sherwood, 312 U.S. 584 (1941)	30
United States Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)	14

TABLE OF AUTHORITIES—Continued

	Page
Upshur County v. Rich, 135 U.S. 467 (1890)	37
Welch v. Texas Department of Highways & Public Transportation, 483 U.S. 468 (1987)	19, 47
West v. Gibson, 527 U.S. 212 (1999)	8, 27, 28, 30
CONSTITUTION	
U.S. CONST. amend. XI	*passim*
U.S. CONST. amend. XIV	44, 46
U.S. CONST. art. I	*passim*
U.S. CONST. art. III	*passim*
STATUTES	
Immigration Reform and Control Act, 8 U.S.C.A. § 1324b (West 1999)	
8 U.S.C.A. § 1324b(a)(1) (West 1999)	28
8 U.S.C.A. § 1324b(d)(2) (West 1999)	28
8 U.S.C.A. § 1324b(g)(2)(B)(iii)-(iv) (West 1999)	28
15 U.S.C.A. § 1175 (West 1998 & Supp. 2001)	5
Shipping Act of 1916, 46 U.S.C.A. app. §§ 801-842 (West 1975 & Supp. 2001)	44
Shipping Act of 1984, 46 U.S.C.A. app. §§ 1701-1719 (West 1975 & Supp. 2001)	1, 44
46 U.S.C.A. app. § 1701(2)	49
46 U.S.C.A. app. §§ 1703-1706	2
46 U.S.C.A. app. § 1709(b)(10)	2, 5
46 U.S.C.A. app. § 1709(d)(1)	49
46 U.S.C.A. app. § 1709(d)(2)	49
46 U.S.C.A. app. § 1709(d)(4)	2, 5
46 U.S.C.A. app. § 1710(a)	2, 34
46 U.S.C.A. app. § 1710(b)	34, 36
46 U.S.C.A. app. § 1710(c)	2, 49
46 U.S.C.A. app. § 1710(g)	2, 3, 34

TABLE OF AUTHORITIES—Continued

	Page
46 U.S.C.A. app. § 1710(h)	34
46 U.S.C.A. app. § 1711(a)	34
46 U.S.C.A. app. § 1712(a)	49
46 U.S.C.A. app. § 1713	49
46 U.S.C.A. app. § 1713(c)	3, 35
46 U.S.C.A. app. § 1713(d)	38
46 U.S.C.A. app. § 1713 (d)(1)	35
REGULATIONS	
28 C.F.R. § 68.28 (2001)	25
46 C.F.R. § 501.5 (2001)	49
46 C.F.R. § 501.5(i) (2001)	2
46 C.F.R. pt. 502, subpt. J (2001)	3
46 C.F.R. pt. 502, subpt. R (2001)	3
46 C.F.R. § 502.61(2001)	35, 36
46 C.F.R. § 502.147 (2001)	25, 35
46 C.F.R. § 502.223 (2001)	35, 36
46 C.F.R. § 502.227 (2001)	3, 35
46 C.F.R. §§ 502.281-291 (2001)	2, 49
46 C.F.R. § 502.285(a) (2001)	3
MISCELLANEOUS	
CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (rev. ed. 1926)	17
3 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 533 (2d ed. 1836)	17
1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.3 (3d ed. 1994)	33
[VOL. P-Z] LLOYD'S REGISTER OF SHIPPING: REGISTER OF SHIPS 1999-2000 (1999)	4

TABLE OF AUTHORITIES—Continued

	Page
Memorandum from John C. Harrington, Deputy Assistant Attorney General, Office of Legal Counsel, to the General Counsel, Department of the Navy, dated August 17, 1992 ("Re: Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices")	28-30
THE FEDERALIST No. 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961)	16
1 WILLIAM BLACKSTONE, COMMENTARIES *241-*244	25

BRIEF FOR RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY

OPINIONS BELOW

The respondent South Carolina State Ports Authority ("Ports Authority") agrees with the petitioner's citation of the opinions below with two exceptions. The opinion of the Federal Maritime Commission ("Commission") appears in the Appendix to Petition for Writ of Certiorari ("Pet. App.") at 27a-38a. Also, the opinion of the administrative law judge appears in the Pet. App. at 39a-62a.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent parts of sections 2, 10, and 13 of the Shipping Act of 1984, 46 U.S.C.A. app. §§ 1701-1719 (West 1975 & Supp. 2001) (hereinafter "Shipping Act"), appear in the Appendix at 1a-2a, as additions to the provisions cited by the Commission.

STATEMENT

This case involves the State of South Carolina's assertion of its sovereign immunity from a suit filed by a private citizen before the Commission against the Ports Authority, an agency of the State.

South Carolina Maritime Services, Inc. ("Maritime Services"), a corporation organized under the laws of the State of South Carolina, filed a complaint against the Ports Authority with the Commission seeking injunctive relief and reparations for alleged violations of the Shipping Act of 1984. (J.A. at 7). The State asserted, *inter alia*, sovereign immunity as a defense. *Id.* at 18.

The United States Court of Appeals for the Fourth Circuit held that a state is entitled to assert its sovereign immunity in a suit filed by a private party with a federal administrative

agency. *S.C. State Ports Auth. v. Fed. Mar. Comm'n*, 243 F.3d 165 (4th Cir. 2001) (Pet. App. at 1a-25a).

1. *The Federal Maritime Commission.* The Commission is a federal regulatory agency located in Washington, D.C., holding specified regulatory responsibilities over ocean shipping services in United States foreign commerce as set forth in the Shipping Act. The Commission primarily oversees certain agreements exempted from antitrust laws among ocean common carriers or other entities, such as marine terminal operators, engaged in United States foreign commerce. 46 U.S.C.A. app. §§ 1703-1706. The Commission has no jurisdiction over gambling vessel operations, safety, environmental protection, navigation, vessel construction, vessel documentation, vessel inspection, or licensing of seafaring personnel.

The principal shipping statute that is administered by the Commission is the Shipping Act. In pertinent part, the Act authorizes private formal complaints alleging violations of the Act, including the granting of "any undue or unreasonable preference" or "unreasonably refus[ing] to deal." 46 U.S.C.A. app. §§ 1709(d)(4) & (b)(10).

The Shipping Act authorizes two kinds of proceedings to determine a violation of the Act. First, the Shipping Act authorizes the Commission to conduct its own investigations into alleged violations of the Act. *Id.* § 1710(c); *see also* 46 C.F.R. § 501.5(i) (2001) (establishing responsibilities of the Bureau of Enforcement); 46 C.F.R. § 502.281-291 (2001) (discussing nonadjudicatory investigations). Second, section 11(a) of the Shipping Act allows a private citizen to file a complaint with the Commission for alleged violations of the Act, 46 U.S.C.A. app. § 1710(a), and grants the Commission the authority to award reparations to the private citizen. *Id.*

§ 1710(g).[1] As the Fourth Circuit concluded below, the doctrine of sovereign immunity, embodied in the Eleventh Amendment, bars the proceeding when a private party files a complaint against a nonconsenting state. (Pet. App. at 23a).

When a party files a formal complaint with the Commission, the proceeding "takes the form of an adjudication." *Id.* at 15a. The case is assigned to an administrative law judge, who presides over discovery, pre-trial and trial proceedings. 46 C.F.R. pt. 502, subpt. J. The administrative law judge issues a decision that is final and binding unless a party requests review by the Commission or the Commission undertakes review on its own initiative. *Id.* § 502.227.

Unlike private complaint proceedings, when the Commission initiates its own investigation, it selects the target(s) of the investigation, frames the issues, establishes a schedule for the investigation, and authorizes its representatives to conduct the investigation. *Id.* pt. 502, subpt. R. The Commission primarily regulates through this investigatory authority. Since 1990, the Commission has brought an average of 208 formal investigations per year and collected an average of $6 million in civil penalties per year. *See* 1990-2000 FED. MAR. COMM'N ANN. REPS. (Appendix at 3a). Further, the Commission may hold investigational hearings, which are "distinguished from hearings in adjudicatory proceedings," 46 C.F.R § 502.285(a), and may seek an injunction in federal district court, if warranted. 46 U.S.C.A. app. § 1713(c).

---

[1] Section 1710(g) provides in part:

> (g) Reparations. For any complaint filed within 3 years after the *cause of action* accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this chapter plus reasonable attorney's fees . . . .

46 U.S.C.A. app. § 1710(g) (emphasis added).

The Ports Authority does not challenge the Commission's authority to use this investigative power to regulate state conduct, recognizing that its sovereign immunity does not apply in an action brought by the federal government. Because Congress provided the Commission with jurisdiction to investigate and bring its own action as it deems appropriate, the Fourth Circuit's decision does not impair the Commission's enforcement of the Shipping Act; nor does it leave state ports immune from regulation, as the United States concedes. (Br. for United States in Opp'n to Pet. for Cert. at 20-21).

2. *The Proceedings Below.* Maritime Services, a South Carolina citizen, chartered a passenger ship known as the M/V TROPIC SEA intending to offer gambling cruises to nowhere and to the Bahamas from the port of Charleston, South Carolina. (J.A. at 7, 9, ¶¶ 1, 8). The gambling would occur in international waters. *Id.* at 9-10, ¶¶ 8-9. The M/V TROPIC SEA was originally classified as a ferry.[2] Although it can board 800 passengers, it has overnight accommodations for only 200 passengers. (J.A. filed in the 4th Cir. at 35).

The Ports Authority has an established policy of denying berthing space to vessels whose primary purpose is gambling. *Id.* at 18. Based on this policy and its finding that the M/V TROPIC SEA is primarily a gambling vessel, the Ports Authority denied Maritime Services a berth at the Charleston harbor. In its complaint before the Commission, Maritime Services alleged that the Ports Authority allowed another cruise vessel to berth in Charleston's port, (J.A. at 12-14, ¶¶ 22-27), and that the Ports Authority's refusal to grant the same privilege to the M/V TROPIC SEA was unreasonable and discriminatory under the Shipping Act, *id.* at 10-12, ¶¶ 10-21.

[2] [Vol. P-Z] LLOYD'S REGISTER OF SHIPPING: REGISTER OF SHIPS 1999-2000 at 1497 (1999). The M/V TROPIC SEA is also known as the M/V TROPICANA, the classification of which appears in this widely used industry ship register.

However, the other cruise vessel was operated by Carnival Cruise Lines and unquestionably had a primary purpose other than gambling. (J.A. filed in the 4th Cir. at 35).

Maritime Services alleged that the Ports Authority's disparate treatment violated the Shipping Act by refusing to deal, 46 U.S.C.A. app. § 1709(b)(10), and by unduly and unreasonably preferring a cruise line and prejudicing Maritime Services, *id.* § 1709(d)(4). (J.A. at 14-15, ¶¶ 28-33). Maritime Services sought a cease and desist order as well as compensation for actual damages, interest, and attorney's fees. *Id.* at 16. Maritime Services also requested that the Commission seek a temporary restraining order and a preliminary injunction from the district court, enjoining the Ports Authority from refusing to provide berthing space to the M/V TROPIC SEA. *Id.*

The Commission assigned the complaint to its chief administrative law judge, and the Ports Authority filed a motion to dismiss the complaint asserting, *inter alia,* sovereign immunity.[3] Because the Ports Authority is indisputably an arm of the State of South Carolina, *see Ristow v. S.C. Ports Auth.*, 58 F.3d 1051, 1052 (4th Cir. 1995), Chief Administrative Law Judge Kline granted the Ports Authority's motion and dismissed the complaint on January 5, 2000. Judge Kline concluded that the Commission could avoid all sovereign immunity issues by invoking its authority to institute its own investigation into the alleged violations, or the Commission could refer the case to the Commission's Bureau of Enforcement for its recommendation. (Pet. App. at 39a-62a).

Notwithstanding his recommendation, the Commission, *sua sponte,* reviewed and reversed Judge Kline's decision in a

[3] The Ports Authority also challenged the Commission's authority to review the state regulation of gambling vessels under the Johnson Act, 15 U.S.C.A. § 1175 (West 1998 & Supp. 2001), and raised other jurisdictional issues.

closed Commission meeting without briefing or a hearing. *Id.* at 27a-38a. The Ports Authority filed a timely petition for review with the United States Court of Appeals for the Fourth Circuit. The United States and the Commission appeared as respondents before the Fourth Circuit and took different positions on the enforceability of Commission orders against a nonconsenting state. The United States argued below that the complainant could file and prosecute a suit with the Commission against a nonconsenting state, but conceded that any reparations order issued by the Commission would not be enforceable in a federal district court. The Commission disagreed with the United States, arguing instead that its orders are fully enforceable against a state.

In a unanimous opinion written by Chief Judge Wilkinson, the Fourth Circuit reversed the Commission's judgment and remanded the case with instructions to dismiss. *Id.* at 25a. Relying upon Supreme Court precedent which holds that a state's sovereign immunity "transcends the forum in which the state is sued," the Fourth Circuit held that a state is entitled to assert its sovereign immunity in private complaints filed with federal administrative agencies. *Id.* at 6a. The Fourth Circuit's holding is also consistent with the Tenth Circuit's holding that both the United States and a state are entitled to assert sovereign immunity in a federal administrative agency's adjudication of a private complaint. *Hensel v. Office of the Chief Admin. Hearing Officer*, 38 F.3d 505, 508-10 (10th Cir. 1994).

SUMMARY OF ARGUMENT

The Ports Authority is an arm of the State, and therefore, is not subject to private suits without its consent as guaranteed by the doctrine of sovereign immunity embodied in the United States Constitution. The immunity is not lost merely because the suit is filed with an Article I tribunal, as opposed to an Article III court.

In *Alden v. Maine*, 527 U.S. 706 (1999), this Court held that the States' sovereign immunity applies in their own state court proceedings. *Alden* followed Supreme Court precedent, dating back to *Hans v. Louisiana*, 134 U.S. 1 (1890), which consistently holds that the States' sovereign immunity is not limited by the terms of the Eleventh Amendment. In *Alden*, this Court rejected the argument that the States are immune only in courts exercising the "judicial power of the United States" as the phrase is used in the Eleventh Amendment. To the contrary, the Court held that the States' constitutional guarantee of sovereign immunity applies "regardless of the forum." *Alden*, 527 U.S. at 749.

Thus, *Alden* commands the answer to the question presented in this case. The States retain their right to immunity from private complaints filed in federal district courts, federal administrative proceedings, and their own state courts. *Alden's* application to federal administrative proceedings is reinforced by the adversarial nature of the agency's adjudication of private complaints. As the Fourth Circuit found, private complaint proceedings before the Commission are properly classified as adjudications. "An impartial officer presides in an adversarial proceeding to determine the rights and responsibilities of different parties." (Pet. App. at 15a-16a). "The proceeding thus walks, talks, and squawks very much like a lawsuit." *Id.* at 15a.

Sovereign immunity would have little substance if Congress could abrogate that immunity by changing the forum for the adjudication of private complaints against a nonconsenting state. In *Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996), this Court held that Congress could not abrogate the States' immunity pursuant to its Article I powers by enacting legislation that subjects the States to suits filed by private parties. Thus, the rationale of *Seminole Tribe* requires the application of the doctrine of sovereign immunity to federal administrative proceedings. To hold otherwise would grant Congress the power to avoid this Court's proscription

that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.*

In *Hans*, this Court assumed that the identical principle of sovereign immunity applies to both the States and the United States. This flows inexorably from the structure of the Constitution itself, because the immunity is inherent in the sovereignty that the United States obtained from and shares with the States. All three branches of the government of the United States recognize that the principle of sovereign immunity—as it is asserted by the United States—applies to federal administrative proceedings as well as judicial proceedings.

In *West v. Gibson*, 527 U.S. 212 (1999), all members of this Court acknowledged that the federal government's sovereign immunity applies in federal administrative proceedings. Because this Court has consistently recognized that our constitutional system of government is based in part upon the dual sovereignty of the United States and the States, the States are certainly "entitled to a reciprocal privilege" in this case. *Alden*, 527 U.S. at 749-50. Neither the Commission nor the United States offers, much less explains the basis for, any distinction between the principle of sovereign immunity as applied to the States and the United States.

The Shipping Act does not abrogate the States' sovereign immunity, South Carolina has not waived its immunity from this suit, and no other exception to the doctrine of sovereign immunity applies. Thus, the Fourth Circuit properly concluded that the Commission does not have jurisdiction over the Ports Authority in this private suit seeking monetary and injunctive relief.

ARGUMENT

I. THE DOCTRINE OF SOVEREIGN IMMUNITY BARS THE COMMISSION FROM ADJUDICATING A SUIT FILED BY A PRIVATE PARTY AGAINST A NONCONSENTING STATE.

The doctrine of sovereign immunity embodies the bedrock principle that a sovereign may not be sued by a private citizen absent its consent. The doctrine and its widespread acceptance predate the Constitution and the founding of our Nation. Indeed, sovereign immunity is one of the first principles woven in the fabric that forms the backdrop of our dual system of government, and immunity is inherent in the concept of sovereignty itself. A respect for the sovereignty of both the States and the United States has remained critical to a functional coexistence between the federal government and the governments of the States.

A. *Alden* and *Seminole Tribe* compel the conclusion that the States' sovereign immunity applies in private suits before federal administrative tribunals.

This Court's recent decisions in *Alden* and *Seminole Tribe* compel only one answer to the question presented in this case. These decisions teach, respectively, that a state's constitutional right to immunity from private suits without its consent applies regardless of the forum in which the suit is brought and that Congress cannot use its Article I powers to curtail a state's sovereign immunity rights. No further authority is needed to conclude that private suits before federal administrative tribunals implicate the States' sovereign immunity.

1. *The States retain their constitutional right to assert their sovereign immunity from private suits, regardless of the forum in which the action is brought.*

In *Alden*, this Court established that the doctrine of sovereign immunity does not depend on the forum, but rather on the identity of the defendant and the plaintiff. *See Alden*, 527 U.S. at 749 (holding that private suits against non-consenting States subjects the States to the indignity of the coercive process "regardless of the forum"); *see also id.* at 733 (sovereign immunity "does not turn on the forum in which the suits [are] prosecuted"). If the defendant is a state or a state agency, it enjoys immunity from suit filed by a plaintiff that is a private party, unless the state has consented to the suit. Indeed, *Alden* stands for the proposition that "the sovereign immunity of the states transcends the forum in which the state is sued." (Pet. App. at 6a). The Fourth Circuit, therefore, properly found that "a state's sovereign immunity is not so fleeting as to depend upon the forum in which the state is sued." *Id.* at 2a.

The Fourth Circuit properly applied this Court's holding in *Alden* to the question presented in this case:

> The states' concerns with affronts to their dignity and to the possibility of having to answer for their war debts would not disappear because the forum magically changed from an Article III court to an Article I tribunal. And while the coordinate branches of the federal government have the broadest latitude in organizing themselves as they see fit, they cannot employ an administrative structure that allows an end-run around the Constitution. Sovereign immunity is not so hollow a concept as to prohibit proceedings in certain fora like a federal or state court while at the same time permitting a similar proceeding to take place under the auspices of a legislative court or an agency adjudication. Dual sovereignty posits a relationship of mutual respect between Congress and the states. It is not consistent with that relationship for Congress to subject an unconsenting sovereign to the coercive club of private actions regardless of the forum.

Id. at 13a (citing *Alden*, 527 U.S. at 733).

The State is not asking this Court to reach a novel holding here, nor was *Alden* a departure from existing jurisprudence. Instead, this Court recognized over 100 years ago the principle that "neither a State nor the United States can be sued as a defendant *in any court in this country* without [its] consent." *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883) (emphasis added). This Court also has observed that "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission . . . ." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) (emphasis added), *quoted in Hans*, 134 U.S. at 17, and *Seminole Tribe*, 517 U.S. at 69.

The sound public policy underlying the doctrine of sovereign immunity supports its application regardless of the forum.

> [B]ut for the protection which [sovereign immunity] affords, the government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person.

Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1868). A private suit against a state, whether adjudicated by a federal court, a federal tribunal, or a state court, still violates the same basic policy that supports the States' immunity. The instant suit seeks the same relief a private party would seek in any traditional court; namely, Maritime Services seeks to compel the payment of money from the State and seeks an order from the federal government compelling the State to

act, which violates textbook principles of sovereign immunity regardless of where the private party files the suit. The State still must "defend or default" and "must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor." *Alden*, 527 U.S. at 749. As the Fourth Circuit recognized:

> Whether the proceeding is formally called an administrative action, a lawsuit, or an adjudication does not matter. The fundamental fact, which respondents cannot escape, is that this proceeding requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state.

(Pet. App. at 14a).

Therefore, it is clear that a private party cannot bring an adversarial proceeding against a nonconsenting state in any forum, whether that forum be a federal court, the state's own courts, or a federal administrative tribunal.

2. *Congress cannot use its Article I powers to circumvent the constitutional limitations on the States' amenability to suit.*

The question before this Court is also answered by the Court's statement in *Seminole Tribe* that "Article I cannot be used to circumvent the constitutional limitations placed upon *federal jurisdiction.*" *Seminole Tribe,* 517 U.S. at 73 (emphasis added); *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000) (holding that "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals."). "Federal jurisdiction" includes federal administrative agencies sitting in an adjudicative capacity.

The Commission's adjudication of the private plaintiff's claim in this case would not differ in its effect upon the State from an Article III tribunal's adjudication of the same claim. The Article I tribunal serves the same purpose as an Article

III court. In either case, a nonconsenting State is haled into court by a private citizen who seeks injunctive relief and monetary damages from the State. As the Fourth Circuit aptly noted, "it is equally well established that sovereign immunity bars not just lawsuits filed in courts of law, but rather all proceedings against a non-consenting sovereign." (Pet. App. at 8a). Moreover, this Court's "cases involving non-Article III tribunals have held that these courts exercise the judicial power of the United States." [4] *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 889 (1991).

The States entered the Union with their immunity over 200 years ago, and the right of immunity remains intact today regardless of the creation by Congress of new Article I courts not contemplated by the drafters or the States when the Constitution was adopted. Indeed, a remarkable irony would result if Congress did not have the authority to abrogate the States' immunity through legislation enacted pursuant to Article I (and indubitably it does not), but Congress could legislatively create Article I courts to adjudicate private suits against the States involving Article I concerns and the States' immunity would not apply. To deny the States their sovereign immunity in federal administrative proceedings would permit the anomalous result of allowing Congress to enact legislation creating Article I courts and vest those courts with broad jurisdiction over private suits filed against the States.

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[4] Judicial power is regularly exercised outside the walls of Article III courts. Non-Article III courts enforce federal civil and criminal laws. It would be shocking to find that cases tried in military tribunals, for example, involving severe criminal sanctions, do not involve the judicial power of the United States. Further, territorial courts, which are not Article III courts, decide cases governed by admiralty and maritime law, even though the Constitution expressly states that "all Cases of admiralty and maritime Jurisdiction" fall within the "judicial power" of the United States. *Palmore v. United States*, 411 U.S. 389, 403 (1973) (citing *Am. Ins. Co. v. Canter,* 26 U.S. (1 Pet.) 511 (1828)).

Even more troublesome is the potential that Article I courts could adjudicate the very private party suits this Court has decried as running afoul of the States' sovereign immunity, compromising the well settled principle that Congress cannot sidestep constitutional limitations. *See United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995); *Harris v. McRae*, 448 U.S. 297, 331 (1980). These federal administrative tribunals would enjoy far greater power over the States than that held by Article III courts. Allowing this result would be diametrically opposed to this Court's holding in *Seminole Tribe* that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S. at 73.

The administrative law judge in this case aptly recognized this irony and concluded:

> If federal courts that are established under Article III of the Constitution must respect States' 11th Amendment immunity and Congress is powerless to override the States' immunity under Article I of the Constitution, it is irrational to argue that an agency like the Commission, created under an Article I statute, is free to disregard the 11th Amendment or its related doctrine of State immunity from *private* suits.

(Pet. App. at 59a).

Because the States' sovereign immunity applies "regardless of the forum," *Alden*, 527 U.S. at 749, and because Congress may not use its Article I powers to strip the States of their immunity, *Seminole Tribe*, 517 U.S. at 73, the only possible conclusion is that the States are entitled to assert their immunity in federal administrative proceedings when sued by a private citizen. Any other result would raise up "anomalous and unheard-of proceedings," *Hans*, 134 U.S. at 18, to which the States did not agree when ratifying the Constitution and allocating federal powers. It would also provide a beltway around the Constitution and this Court's precedent recognizing the constitutional limitation on Congress'

authority to abrogate the States' immunity. Denying the States their immunity in federal administrative proceedings would allow Congress to create a forum for private party disputes heretofore barred against the States in Article III courts and state courts.

If the holding of *Seminole Tribe* that Congress may not abrogate the States' immunity under Article I is to have any meaning and effect, the case must equally prohibit the creation by Congress of Article I courts with jurisdiction over nonconsenting states. Because Congress has "wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals," *Freytag*, 501 U.S. at 910, it would be anomalous, and contrary to *Alden*, to limit sovereign immunity to Article III court proceedings. *See Alden*, 527 U.S. at 730 (concluding that the States' sovereign immunity "is not directly related to the scope of the judicial power established by Article III"). The Fourth Circuit recognized this irony below and properly refused to allow the inconsistent result. As the court observed, "[i]f Article I courts can indeed exercise the judicial power, it would seem anomalous to limit state sovereign immunity strictly to an Article III proceeding." (Pet. App. at 11a).

B. History, practice, precedent and the structure of the Constitution demonstrate that the doctrine of sovereign immunity, embodied in the Eleventh Amendment, applies to federal administrative proceedings.

Long gone are the days in which one could legitimately argue that a state's immunity from suit without its consent was limited by the precise verbiage of the Eleventh Amendment. This Court has recognized that while the States' sovereign immunity is often referred to as "Eleventh Amendment immunity," the phrase is "something of a misnomer, for the sovereign immunity of the States neither

derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden*, 527 U.S. at 713.

A review of "history, practice, precedent, and the structure of the Constitution" all support the Fourth Circuit's finding that the doctrine of sovereign immunity bars proceedings before the Commission when the Commission adjudicates claims asserted by a private party against a nonconsenting state. *Id.* at 741; *see also Printz v. United States*, 521 U.S. 898, 918 (1997).

1. *History*

As the Fourth Circuit found below, "[t]he doctrine of sovereign immunity predates the founding of our nation." (Pet. App. 3a). The understanding "'that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified,'" *id.* (quoting *Alden*, 527 U.S. at 715-16), and the States entered the Union with this immunity intact, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991).

In its opinions confirming the protections afforded the States by the doctrine of sovereign immunity, the Court relies extensively on the following oft-quoted statement written by Alexander Hamilton (which bears repeating here):

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. . . .

THE FEDERALIST No. 81, at 506 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As the Court has recognized, Hamilton was not alone in his views. James Madison also stated: "It is not in the power of individuals to call any state

into court." 3 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 533 (2d ed. 1836), *quoted in Seminole Tribe*, 517 U.S. at 70 n.12. Echoing Madison, future Chief Justice Marshall recognized: "It is not rational to suppose that the sovereign power should be dragged before a court." *Id.* at 555, *quoted in Hans*, 134 U.S. at 13.[5]

Despite the widespread understanding regarding the States' sovereign immunity at the adoption of the Constitution, in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Supreme Court held that Article III authorized a private citizen of South Carolina to sue the State of Georgia without its consent. *Id.* at 450-51 (opinion of Blair, J.), 465 (opinion of Wilson, J.), 466-67 (opinion of Cushing, J.), 476-77 (opinion of Jay, C.J.). The outrage following the Court's decision provoked the almost immediate ratification of the Eleventh Amendment. *See, e.g.*, CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (rev. ed. 1926) (noting that *Chisholm* "fell upon the country with a profound shock"), *quoted in Alden*, 527 U.S. at 720. History teaches "that Congress acted not to change but to restore the original constitutional design" in enacting the Eleventh Amendment. *Alden*, 527 U.S. at 722. Thus, the Eleventh Amendment reflects "a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away."

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[5] "[T]his Court has consistently taken the views of Madison, Marshall, and Hamilton as capturing the true intent of the Framers." *Nevada v. Hall*, 440 U.S. 410, 436 (1979) (Rehnquist, J., dissenting) (citing *Edelman v. Jordan*, 415 U.S. 651, 660-62 (1974); *Monaco v. Mississippi*, 292 U.S. 313, 323-30 (1934); *Hans*, 134 U.S. at 12-15). The Framers' views provide a powerful voice, and this Court has "usually regarded [their views] as indicative of the original understanding of the Constitution." *Printz*, 521 U.S. at 910.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 32 (1989) (Scalia, J., dissenting), *overruled by Seminole Tribe*, 517 U.S. at 63-73.

History is telling. The Framers and proponents of the Constitution promised the States in no uncertain terms that they would continue to be immune from suits at the hands of private citizens. Without this promise, it is clear the States would never have ratified the Constitution, thereby creating the federal government vested with "few and defined powers." *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991).

The Framers' understanding of the doctrine of sovereign immunity, as applied to both the States and the United States, focused upon the suability of a sovereign, and not upon the forum in which the suit was brought. The constitutional debates certainly addressed Article III, but only because of the concern that Article III might subject nonconsenting states to private suits. The basis for rejecting the idea that Article III granted such a power derived from the general understanding that the "suability of a state" by a private party "was a thing unknown to the law," *Hans*, 134 U.S. at 15-16, and the States' immunity would be preserved inviolate under the constitutional design, *Printz*, 521 U.S. at 918-19. Obviously, the debates did not address the suability of a state by private parties before a federal administrative tribunal because such a forum generally was not available or contemplated at that time.

2. *Practice*

Looking back to early congressional practice, statutes did not exist that authorized private suits before federal administrative agencies against nonconsenting States. *See Alden*, 527 U.S. at 744 (concluding that "statutes purporting to authorize [private suits] in any forum are all but absent from our historical experience" until this Court faced the issue in the 1964 case of *Parden v. Terminal Railway of the*

Alabama State Docks Department, 377 U.S. 184 (1964)).[6] While similar statutes may have been enacted in the last generation, "'they are of such recent vintage that they are no more probative than the [statute under review] of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice.'" *Alden*, 527 U.S. at 744 (quoting *Printz*, 521 U.S. at 918). Early congressional practice suggests that Congress understood from the beginning that the States' sovereign immunity would apply in any forum; and thus, Congress did not attempt to subject the States to private suits before federal administrative tribunals or any other fora.

Against the backdrop of history that demonstrates the importance of the States' sovereign immunity to the founding generation, this Court has "recognized a 'presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the constitution was adopted.'" *Id.* at 727 (quoting *Hans*, 134 U.S. at 18). This Court has "often described the States' immunity in sweeping terms, without reference to whether the suit was prosecuted in state or federal court." *Id.* at 745. Thus, this Court has upheld the States' immunity in various contexts falling outside the literal text of the Eleventh Amendment.

Because private suits filed with federal administrative agencies against nonconsenting states were "anomalous" and "unheard-of proceedings" at the time of the Constitution's adoption, this Court should presume that the States' immunity is preserved and that it protects the States from such proceedings.

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[6] This Court overruled *Parden* in *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987).

3. *Precedent*

This Court has consistently recognized that the Constitution reflects a system of "dual sovereignty." *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (stating that "under our federal system, the States possess sovereignty concurrent with that of the federal government, subject only to the limitations imposed by the Supremacy Clause"). Thus, it is no surprise that since *Chisholm* was rejected by the Eleventh Amendment, this Court has adhered steadfastly to the principle of sovereign immunity as protecting both the States and the United States from suits by private parties without their consent.

As early as 1821, Chief Justice Marshall recognized the application of sovereign immunity to the United States in dicta in both *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-42 (1821), and *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834). Justice Davis, writing for a unanimous Court in *Nichols*, focused on the importance of the operation of sovereign immunity to the sovereign's performance of its duties. *Nichols*, 74 U.S. (7 Wall.) at 126.

In *Hans*, the Court held that the Eleventh Amendment bars a citizen from suing his own State even though the literal text of the Amendment only appears to prohibit suits filed against states by citizens of another state or of a foreign state. *Hans*, 134 U.S. at 1. After reviewing the history of the Eleventh Amendment, the Court noted the "'established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent.'" *Id.* at 17 (quoting *Beers*, 61 U.S. (20 How.) at 529). The Court reiterated its own holding in *Cunningham* that the sovereign immunity enjoyed by the States is concurrent with that of the United States:

> "It may be accepted as a point of departure unquestioned," said Mr. Justice MILLER . . . , "that *neither a state nor the United States* can be sued as

> defendant in any court in this country without their consent . . . ."

Id. (quoting *Cunningham*, 109 U.S. at 451) (emphasis added). The Court concluded that adhering to the "letter" of the Amendment would not serve the doctrine of sovereign immunity embodied in the Eleventh Amendment. *Id.* at 15.

In *Seminole Tribe*, the Court rejected the plurality opinion of *Union Gas* that the Interstate Commerce Clause in Article I granted Congress the authority to abrogate the States' immunity from suit, and the Court expressly held that Article I *does not* authorize Congress to abrogate the States' sovereign immunity. *See Seminole Tribe*, 517 U.S. at 63-73. In so holding, the Court reconfirmed that

> [T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States . . . . *Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.*

Id. at 72-73 (emphasis added). Even though the statute at issue only authorized prospective injunctive relief, the Court held that "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity."[7] *Id.*

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[7] The Fourth Circuit below correctly concluded that even if Maritime Services only sought injunctive relief against the Ports Authority in this case, the doctrine of sovereign immunity would still bar the suit. (Pet. App. at 6a). As the Court recognized in *Seminole Tribe*, "we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment. . . . We think it follows *a fortiori* from this proposition that the type of relief

at 58. A state's sovereign immunity protects it not only from judgments paid out of its treasury, but also from the indignity of being haled into court by a private party and having to defend itself. *Id.*

Most recently, in *Alden*, this Court held that Article I does not grant Congress the authority to subject nonconsenting States to private suits in their own courts. *Alden*, 527 U.S. at 712. This Court reasoned: "Private suits against nonconsenting States, however, present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' *regardless of the forum*." *Id.* at 749 (quoting *Ex parte Ayers*, 123 U.S. 443, 505 (1887)) (emphasis added); *see also id.* at 733 (holding that sovereign immunity "does not turn on the forum in which the suits [are] prosecuted"). In analyzing the scope of the States' immunity, this Court expressly recognized that the United States enjoys sovereign immunity and that the States are "entitled to a reciprocal privilege." *Id.* at 749-50.

Thus, when this Court embarks to define the scope of the States' sovereign immunity, it honors the promise made to the States over 200 years ago and paints with a broad brush. *See id.* at 745 (describing the States' sovereign immunity in "sweeping terms"); *Nevada v. Hall*, 440 U.S. 410, 438 (1979) (noting that "[w]hen the State's constitutional right to sovereign immunity has been described, it has been in expansive terms.") (Rehnquist, J., dissenting). This Court's precedent establishes a tremendous respect for the sovereignty of both the United States and the States and makes no distinction between the two sovereigns in defining the scope and application of their sovereignty.

4. *Constitutional Structure*

The Court recognizes that the States retain their immunity from suits brought by private citizens unless "compelling

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sought is irrelevant to whether Congress has the power to abrogate States' immunity." *Seminole Tribe.*, 517 U.S. at 58.

evidence" exists to demonstrate that the States surrendered their immunity under the Constitution and the plan of the Convention. *Alden*, 527 U.S. at 730-31 (citing *Blatchford*, 501 U.S. at 781). In essence, the question before the Court is whether the States delegated to the federal government, as one of the "few and defined" powers, the power to abrogate the States' sovereign immunity in federal administrative proceedings. Stated differently by the Fourth Circuit, the question is "would the founders have countenanced a system by which Congress could have avoided all strictures of sovereign immunity by creating different tribunals where state sovereign immunity was completely inapplicable?" (Pet. App. at 12a-13a). To ask the question is to answer it.

As the Fourth Circuit found below:

> The lesson from "the Constitution's structure, its history, and the authoritative interpretations" by the Supreme Court is unmistakable—an adversarial proceeding against a non-consenting state by a private party triggers sovereign immunity.

Id. at 12a (quoting *Alden*, 527 U.S. at 713).

In determining whether a State enjoys the protections afforded by its sovereign immunity, this Court's decisions make clear that the literal text of the Amendment neither begins nor ends the inquiry into the scope of the States' immunity. The Court has repeatedly warned that blind adherence to the literal text does not honor the principle of sovereign immunity and "'"strain[s] the Constitution and the law to a construction never imagined or dreamed of"'" by the drafters. *Seminole Tribe*, 517 U.S. at 69 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 326 (1934) (quoting *Hans*, 134 U.S. at 16)). Thus, the Court has "'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" *Id.* at 54 (quoting *Blatchford*, 501 U.S. at 779). "This is because the principle of sovereign immunity derives not just from the Eleventh

Amendment, but from the structure and background principles of the Constitution." (Pet. App. at 4a).

> That presupposition, first observed over a century ago in *Hans v. Louisiana* . . . has two parts: first, that each State is a sovereign entity in our federal system; and second, that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,'" . . . . For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States."

Seminole Tribe, 517 U.S. at 54 (citations omitted).

Therefore, the Fourth Circuit correctly held that "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states would not have passed muster at the time of the Constitution's passage nor after the ratification of the Eleventh Amendment." (Pet. App. at 13a).

II. THE STATES ARE ENTITLED TO ASSERT THEIR SOVEREIGN IMMUNITY ON THE SAME TERMS AS THE UNITED STATES.

Based on the same precedent holding that the States are immune from private suits, this Court also subscribes to the "universally received opinion . . . that no suit can be commenced or prosecuted against the United States." *Cohens*, 19 U.S. (6 Wheat.) at 411-12. The United States obtained its sovereign authority, and its very name, by assignment from the States, and whatever attributes of sovereignty are inherent in one must necessarily be inherent in the other. *See Gregory*, 501 U.S. at 457 (recognizing that the States adopted the Constitution that "created a Federal Government of limited powers" and retained the States' "numerous and infinite" powers).

Thus, to the extent that the United States enjoys the benefits of sovereign immunity, it is only because it acquired that attribute of sovereignty from the States. The structure of our

constitutional system embodies and guarantees the United States its immunity from suit, even though the Constitution is silent on the United States' right to immunity.

The United States took no exception to the Tenth Circuit's holding in *Hensel* that both the United States and a state retained their immunity from a private suit before a federal administrative tribunal. The administrative law judge in *Hensel* enjoyed no greater authority than the Commission's administrative law judge in the present case. *Compare* 28 C.F.R. § 68.28 (2001), *with* 46 C.F.R. § 502.147. Without addressing the scope of its own immunity in federal administrative proceedings, the United States now challenges the immunity of the States. Accordingly, this case calls upon the Court to address whether, after nearly 200 years of consistent jurisprudence to the contrary, it should draw a distinction between the scope of the sovereign immunity of the States and the United States. Neither the Commission nor the United States offers any foundation for such a distinction.

A. The sovereign immunity enjoyed by the federal and state governments are concurrent.

Both the United States and the States derive their immunity from the same source—the general understanding of the founding generation when the States adopted the Constitution and formed the United States of America that a sovereign shall not be compelled to answer private suits against its will. The Founders adopted this understanding from the English belief that the king was immune from suit. 1 WILLIAM BLACKSTONE, COMMENTARIES *241-*244.

This Court consistently describes the constitutional system of the United States as one of dual sovereignty because the States' sovereignty is "concurrent with that of the Federal Government." *Tafflin*, 493 U.S. at 458. The Court often intermingles the case law addressing the sovereign immunity of one when analyzing the immunity of the other. *See Hans*,

134 U.S. at 16 (addressing the scope of the States' sovereign immunity, the Court relied upon opinions on the suability of the federal government); *United States v. Lee*, 106 U.S. 196, 206-07 (1882) (in analyzing whether the United States enjoyed immunity, the Court relied upon Justice Iredell's dissent in *Chisholm*, which involved a state's claim of sovereign immunity); *The Siren*, 74 U.S. (7 Wall.) 152, 156 (1868) (relying upon a Pennsylvania state court case defining the scope of Pennsylvania's immunity to support the federal government's immunity in a similar context).

Thus, the principle of sovereign immunity and its application are a general protection afforded to the federal government and the States on the same terms. "It is obvious in our system of jurisprudence, the principle [of sovereign immunity] is as applicable to each of the states as it is to the United States." *Lee*, 106 U.S. at 206. Accordingly, "[i]t may be accepted as a point of departure unquestioned, that *neither a State nor the United States* can be sued as defendant in any court in this country without their consent . . . ." *Cunningham*, 109 U.S. at 450-51 (emphasis added). This is true because "*[e]very government* has an inherent right to protect itself from suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, [and] *applies to every sovereign power* . . . ." *Nichols*, 74 U.S. (7 Wall.) at 126 (emphasis added). Furthermore, "[i]t is a familiar principle that *all governments* possess an immunity from suit, and it is only in a spirit of liberality, and to promote the ends of justice, that they ever allow themselves to be brought into court." *United States v. O'Keefe*, 78 U.S. (11 Wall.) 178, 182 (1870) (emphasis added).[8]

[8] Thus, Congress may waive the federal government's sovereign immunity and permit the United States to be sued by a private party, but Congress may not waive the States' independent sovereign immunity and permit private parties to sue the States.

Most recently, this Court expressly stated in *Alden* that the States are entitled to assert their sovereign immunity on the same terms as the United States. In deciding whether the States enjoy immunity from suits in their own courts, this Court found it significant that the federal government enjoys immunity in its own courts. "In light of our constitutional system recognizing the essential sovereignty of the States," this Court recognized that the States are "entitled to a reciprocal privilege." *Alden*, 527 U.S. at 749-50. Thus, the Court granted the States sovereign immunity on the same terms as the United States enjoys its immunity.

B. The Court's precedent establishes that the federal government's sovereign immunity applies to private suits before federal administrative tribunals.

In *West*, this Court addressed whether the Equal Employment Opportunity Commission ("EEOC"), a federal administrative tribunal, has the authority to award compensatory damages against the federal government in Title VII suits. *West*, 527 U.S. at 214 (5-4 decision). The Justices in the majority found that Congress waived the Government's sovereign immunity through the statute, thereby granting the EEOC the authority to award compensatory damages against the federal government in favor of private citizens. *Id.* at 222. The dissenting Justices disagreed, finding that Congress did not express in clear and unequivocal terms its intent to waive the government's immunity from damages awards. *Id.* at 224-28 (Kennedy, J., dissenting).

Despite the Court's split on the waiver issue, the Court unanimously agreed that the federal administrative agency's adjudication of the private complaint implicated the federal government's sovereign immunity. If immunity did not apply in the proceedings, no discussion or finding of waiver would have been necessary. The majority's analysis establishes that without a waiver under the statute, the Government's immunity would bar the proceedings.

Significantly, *West* unanimously confirms the rule that the United States' immunity applies in proceedings before federal administrative tribunals. *See Seminole Tribe*, 517 U.S. at 67 ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). It must follow that the States are "entitled to a reciprocal privilege." *Alden*, 527 U.S. at 749-50.

C. The United States has asserted its sovereign immunity in federal administrative proceedings.

The United States has also advocated the view that its immunity applies in federal administrative proceedings. A published opinion from the Office of Legal Counsel ("OLC") confirms that the sovereign immunity of the United States is implicated in federal administrative proceedings initiated by a private party. *See* Memorandum from John C. Harrington, Deputy Assistant Attorney General, Office of Legal Counsel, to the General Counsel, Department of the Navy, dated August 17, 1992 ("Re: Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices"), (hereinafter "OLC Memorandum") (Appendix at 4a-21a). A private citizen alleged that the Navy violated the Antidiscrimination Provision of the Immigration Reform and Control Act, 8 U.S.C. § 1324b(a)(1) (West 1999) (hereinafter "IRCA"), which allows the private party to seek injunctive relief, back pay, and civil penalties. *Id.* §§ 1324b(d)(2) & 1324b(g)(2)(B)(iii)-(iv).

The OLC concluded that "[e]nforcement of the Antidiscrimination Provision against the federal government plainly would implicate the sovereign immunity of the United States." OLC Memorandum (Appendix at 8a). The OLC reasoned that sovereign immunity must bar a private party from bringing an action against the United States before the federal administrative agency because an award of back pay

against the United States would "expend itself on the Treasury" and an order requiring the hiring of certain individuals would "restrain the United States Government from acting or compel it to act." *Id.* at 8a-9a (citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963); *Land v. Dollar*, 330 U.S. 731, 738 (1947)). The OLC also noted that IRCA provides for judicial enforcement of administrative orders in district courts, *id.* at 9a, and thus, "disputes under IRCA . . . are not resolved entirely within the executive branch." *Id.* at 8a n.3. Significantly, the OLC found that "[t]he fact that application of the Antidiscrimination Provision to federal agencies would render one aspect of the enforcement scheme ineffectual provides independent reason to question the application of the provision to these agencies." [9] *Id.* at 9a n.4.

The United States has also asserted its sovereign immunity in the same context as the State asserts its immunity in this case. In *Hensel*, both the State of Oklahoma and the United States asserted their sovereign immunity in a suit filed by a private party before a federal administrative tribunal. Alleging that the defendants violated IRCA, the plaintiff filed a discrimination claim against a state health center and a federal teaching hospital with the Administrative Law Judge of the United States Department of Justice Executive Office for Immigration Review ("ALJ"). *Hensel*, 38 F.3d at 506-07.

On appeal, the United States argued: "Sovereign immunity bars an action if, among other things, '"the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration" . . . or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act."'" Brief of the United States Department of Justice in *Hensel* on behalf of Respondent Oklahoma City Veterans Affairs Medical Center at 19-20

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[9] *See* discussion *infra* Part III.B.2, stating that the unenforceability of the Commission's orders further indicates that the States' immunity applies to the Commission's private complaint proceedings.

(quoting *Dugan*, 372 U.S. at 620 (quoting *Land*, 330 U.S. at 738, and *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949), respectively)) (Appendix 23a). Consistent with the position of the States in both *Hensel* and the present case, the United States argued that allowing the federal administrative agency to adjudicate a private suit against the United States "*plainly would implicate sovereign immunity*. . . . Therefore, sovereign immunity bars this action unless it has been waived." *Id.* (emphasis added).

The Tenth Circuit followed this Court's instruction that """the terms of [the United States'] consent to be sued *in any court* define that court's jurisdiction to entertain the suit."'" *Hensel*, 38 F.3d at 507 (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941))) (alteration in original, emphasis added). The Tenth Circuit, therefore, agreed with the United States that its immunity applied and that the United States had not waived its immunity. *Id.* at 509-10. As to the state defendant, the court held that the state health center is an arm of the state and likewise is entitled to the protections of the Eleventh Amendment in a federal administrative agency suit filed by a private party. *Id.* at 508. Accordingly, the Tenth Circuit held that the ALJ lacked jurisdiction over both the United States and the State of Oklahoma to adjudicate the private party complaint. *Id.* at 510.

Thus, all three branches of the federal government agree that the United States enjoys immunity from suit in federal administrative proceedings. *See West*, 527 U.S. at 212; *Hensel*, 38 F.3d at 509-10; OLC Memorandum (Appendix at 8a-9a); S. Rep. No. 92-415, at 16 (1971), *cited in* OLC Memorandum (Appendix at 11a) (explaining that it was necessary to bring federal agencies within the ambit of Title VII because otherwise a claimant would have to overcome a "U.S. Government defense of sovereign immunity").

The foregoing authorities establish that the doctrine of sovereign immunity, if asserted by one sovereign in our dual system of government, may also be asserted by the other. Accordingly, if this Court determines that the States may not assert their sovereign immunity in federal administrative proceedings, the United States will also lose the protection of its immunity in the same proceedings. The more principled rule, which follows *West* and honors the constitutional doctrine of sovereign immunity, would afford the States the same protection granted to the federal government in private suits before federal administrative agencies.

III. THE COMMISSION'S ARGUMENTS FAIL TO SUPPORT STRIPPING THE STATES OF THEIR SOVEREIGN IMMUNITY IN PRIVATE SUITS BEFORE FEDERAL ADMINISTRATIVE AGENCIES.

The Commission fails to establish "compelling evidence" that the States surrendered their sovereign immunity in private suits before federal administrative tribunals. The Commission mistakenly attempts to shift the burden to the State by arguing that "a sovereign immunity defense must be supported by evidence in either constitutional history or constitutional design" and that no evidence exists to support immunity in this case. (Br. for Comm'n at 9). However, the Commission, not the State, must provide "compelling evidence" that the Framers and the States believed the States surrendered their immunity from private suits before federal administrative tribunals. *See Alden*, 527 U.S. at 730-31 (citing *Blatchford*, 501 U.S. at 781). The Commission's attempt to shift the burden magnifies its inability to demonstrate that the States intended to subject themselves to suits of this kind when they ratified the Constitution.

The Commission's arguments for denying the States their constitutional and fundamental right to sovereign immunity in federal administrative proceedings all fail to establish the

"compelling evidence" necessary to hold the States' sovereign immunity is removed when a private party hauls a state through the doors of a federal administrative tribunal.

A. When adjudicating a private complaint, federal administrative agencies exercise the judicial power of the United States.

The Commission mischaracterizes this case as an Eleventh Amendment case and argues that the States' sovereign immunity, guaranteed through that Amendment, only applies to courts exercising "the judicial power established in Article III." (Br. for Comm'n at 20). This argument fails under *Alden*, in which the Court rejected the same argument and held that the States' sovereign immunity defense applies to private suits "regardless of the forum." *Alden*, 527 U.S. at 749. The lesson from *Alden* is that the relationship of the parties—not the forum—determines the application of a state's sovereign immunity.

The Commission's narrow reading of sovereign immunity asserts a rephrased version of the argument attempting to limit the States' sovereign immunity through a literal reading of the Eleventh Amendment. This argument has been so often rejected by the Court it hardly bears refuting. In this case, a South Carolina citizen sued the State of South Carolina—a scenario which falls outside the literal boundaries of the Eleventh Amendment. Yet, it is clear that "[t]he Eleventh Amendment spells out one instance, but not the only one, in which respect and forbearance is due from the national to the state governments, a respect that cements our federation in the Constitution." *Hilton v. S.C. Pub. Ry. Comm'n*, 502 U.S. 197, 210 (1991) (O'Connor, J., dissenting).

The Commission attempts to distinguish this Court's decision in *Freytag*, in which the Court held that the Tax Court (an Article I court) "exercises its judicial power in much the same way as the federal district courts exercise theirs." *Freytag*, 501 U.S. at 891. The Commission incorrectly reads *Freytag* to apply only to non-Article III courts that perform exclusively judicial functions and not to non-Article III courts that perform multiple functions.

The non-judicial functions performed by the Commission are irrelevant to the question presented here. The Commission is "saturated with mixtures of legislative, executive, and judicial powers." 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.3, at 38 (3d ed. 1994).[10] The only issue before the Court is whether private complaint proceedings against a state implicate the state's sovereign immunity. Other aspects of the Commission's duties and responsibilities do not detract from the adversarial and judicial nature of the private complaint proceedings.

This Court's precedent establishes that Article I tribunals can and do exercise "the judicial power of the United States." *See, e.g., Freytag*, 501 U.S. at 889. In its brief before the Fourth Circuit, the Commission conceded that the Customs Service of the United States Department of Treasury—indisputably an executive department—performs functions that are properly characterized as "judicial." (Br. of Comm'n before 4th Cir. at 34); *see also Ex parte Bakelite Corp.*, 279 U.S. 438, 457-58 (1929) ("But [the Customs Court's] functions, although mostly quasi-judicial, were all susceptible of performance by executive officers, and had been performed by such officers in earlier times.").

Thus, the Fourth Circuit properly interpreted *Freytag* as standing for the proposition that "adjudication by adversarial

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[10] Likewise, James Madison was unsure of how to categorize the entire range of responsibilities exercised by the Comptroller within the Department of Treasury. 1 DAVIS, *supra*, at 39. As a result, Madison characterized this executive officer's duties as "executive, judicial, both, and neither." *Id.*

proceedings *can* exist outside the context of Article III," and "Article I tribunals may exercise the judicial power of the United States." (Pet. App. at 11a (citing *Freytag*, 501 U.S. at 889)).

B. The Commission's adversarial adjudication of private complaints against a state clearly implicates the state's sovereign immunity.

The Commission argues that the private complaint proceeding is not a "suit" as the term is used in the Eleventh Amendment and that the Commission merely exercises its executive powers through private complaint proceedings. (Br. for Comm'n at 23-25). As the Fourth Circuit aptly recognized, however, "[t]he fundamental fact, which [the Commission] cannot escape, is that this proceeding requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state." (Pet. App. at 14a).

1. *A private complaint filed with the Commission initiates a suit within the scope of the doctrine of sovereign immunity.*

A review of the private complaint provisions of the Shipping Act confirms that the proceedings are adversarial adjudications that implicate sovereign immunity. The Shipping Act authorizes a private party to file a formal "complaint alleging a violation" of the Act, 46 U.S.C.A. app. § 1710(a), and seeking reparations and injunctive and other relief, *id.* §§ 1710(g) & (h). If the party sued does not satisfy the complaint, it must answer the complaint, and the Commission "shall investigate it" and "make an appropriate order." *Id.* § 1710(b). In "adjudicatory proceedings," the private complainant may utilize "depositions, written interrogatories, and discovery procedures," and to the extent practicable, the same rules applicable in federal district courts shall govern the proceedings. *Id.* § 1711(a). The Commission may issue subpoenas to "compel the attendance of witnesses and the production of books, papers, documents, and other evidence," *id.*, and if a party fails to comply, the Attorney General may

seek enforcement of the subpoena in the appropriate federal district court, *id.* § 1713(c). If the Commission orders reparations, the party may seek to enforce the order in the federal district court. *Id.* § 1713(d)(1).

A private complaint proceeding under the Act takes the form of an adjudication, 46 C.F.R. § 502.61, and the "case," *id.* § 502.147, is initially assigned to an administrative law judge ("ALJ"), *id.* § 502.223. The ALJ has the authority to order compliance with the discovery procedures outlined above, plus, "delineate the scope of a proceeding," "hear and rule upon motions," "administer oaths and affirmations," "examine witnesses," "rule upon offers of proof," "act upon petitions to intervene," "hear oral argument at the close of testimony," "fix the time period for filing briefs, motions, and other documents," and "dispose of any other matter that normally and properly arises in the course of the proceedings." *Id.* § 502.147. Any party may request an appeal from the ALJ's decision or the Commission may review the decision *sua sponte*. *Id.* § 502.227. As the Fourth Circuit found, the review is impartial. (Pet. App. at 16a).

Based on the applicable provisions of the Shipping Act and consistent with its earlier opinion in *NVR Homes, Inc. v. Clerks of the Circuit Courts for Anne Arundel County (In re NVR, LP)*, 189 F.3d 442, 451-54 (4th Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000), the Fourth Circuit properly concluded that "[t]he proceeding thus walks, talks, and squawks very much like a lawsuit." (Pet. App. at 15a). In-deed, "[t]he adjudication . . . is just that—an adjudication." *Id.*

Private suits filed against a state with the Commission are "judicial proceedings" within the ambit of the doctrine of sovereign immunity and the Eleventh Amendment. "The ALJ is thus not merely an alternate means of policy implementation," and to hold otherwise would be contrary to precedent and mandates in the Shipping Act. *Id.* at 16a; *see also Butz v. Economou*, 438 U.S. 478, 512-13 (1978)

(concluding that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process" to entitle the ALJ to judicial immunity).

This Court has defined a "suit" as "the prosecution, or pursuit, of some claim, demand, or request. . . . where the party suing claims to obtain something to which he has a right." *Cohens*, 19 U.S. (6 Wheat.) at 407-08. The Court looks to "the essential nature and effect of the proceeding." *Ford Motor Co. v. Dep't of Treasury,* 323 U.S. 459, 464 (1945)). Here, "'the role of the modern federal hearing examiner or administrative law judge . . . is "functionally comparable" to that of a judge.'" (Pet. App. at 16a (quoting *Butz*, 438 U.S. at 513)). "'[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Id.* (quoting *Butz*, 438 U.S. at 513).

The statutory provisions of the Act dispel the Commission's argument that the private complaint proceedings are not a suit, but merely an exercise of executive discretion. The complaint filed by Maritime Services with the Commission "initiated" an adversarial proceeding "pitting" the State against Maritime Services, a citizen of the State. *NVR Homes*, 189 F.3d at 454. Maritime Services' suit, seeking compensation for actual damages, interest, and attorney's fees, (J.A. at 16), "clearly sought a determination" from the Commission that the State owed it money, and a favorable decision would require the Commission, a federal agency, to raid the State's treasury. *NVR Homes*, 189 F.3d at 454.

Moreover, the Commission actually has no discretion to accept or reject the private complaint as part of some policy decision. The relevant statutory and regulatory provisions require the Commission to refer the private complaint to an ALJ for an impartial adjudication. 46 U.S.C.A. app. § 1710(b); 46 C.F.R. §§ 502.61, 502.223. The only executive

discretion exercised by the Commission occurs when it conducts its own investigation and makes its own independent judgment as to whether it will initiate an action.[11] *See Alden*, 527 U.S. at 759-60 ("The difference between a suit by the United States . . . and a suit by the [private party] implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State" in the exercise of its official discretion.).[12]

2. *The Commission's lack of independent enforcement powers does not affect the States' sovereign immunity.*

The ultimate unenforceability of a Commission order against a state further supports the Fourth Circuit's con-

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[11] While the Shipping Act authorizes the Commission to initiate its own investigation and bring suit against the Ports Authority to enforce provisions of the Act, Congress does not have the power to permit a private party to hale a nonconsenting state before a federal administrative tribunal. *See Blatchford*, 501 U.S. at 785.

[12] The Commission cites *Upshur County v. Rich*, 135 U.S. 467 (1890), for the proposition that administrative proceedings, as opposed to judicial proceedings, are carried on by executive officers as part of their official duties and cannot be characterized as a suit. (Br. for Comm'n at 23). In *Upshur County*, although this Court determined that an appeal of a property tax assessment is not a suit that may be removed to federal court, an analysis of the case reveals that it provides no support for the Commission's argument. *See Upshur County*, 135 U.S. at 477 ("the valuation of property for the just distribution of taxes or assessments[] is purely administrative in its character, and cannot, in any just sense be called a 'suit'"). In concluding its decision, this Court recognized that "such an appeal may become a suit, if made to a court *or tribunal having power to determine questions of law and fact*, either with or without a jury, and *there are parties litigant to contest the case on the one side and the other.*" *Id.* (emphasis added). As the Fourth Circuit properly concluded, private complaint proceedings before the Commission are lawsuits that implicate sovereign immunity concerns. The administrative law judge issues an order with both legal and factual findings. *See* discussion *supra* pp. 34-36 regarding the judicial nature of private complaint proceedings.

clusion that the States' sovereign immunity applies in federal administrative proceedings. The Shipping Act permits successful complainants to enforce their reparation awards through the "district court having jurisdiction of the parties." 46 U.S.C.A. app. § 1713(d). However, the doctrine of sovereign immunity and the Eleventh Amendment bar such enforcement proceedings against a state.[13] Thus, any reparations awarded to a private litigant in a suit against a state would be unenforceable in the district court and would render the Commission's award futile. A private party's inability to enforce a reparations award further compels the conclusion that a private party could never sue a state in the first instance.

The United States argues that the federal administrative proceeding does not implicate the States' sovereign immunity because the award would not be enforceable in federal district court against a state. (Br. for United States at 18-21). This argument ignores the scope of sovereign immunity and narrowly interprets immunity to protect the States merely from the execution of a judgment rather than from the litigation itself. Moreover, the United States' position would allow Congress to eviscerate the States' sovereign immunity by authorizing private actions against the States as long as any judgment awarded could not be executed by formal legal process initiated by a private litigant.

Contrary to the United States' position, the immunity is from suit, not simply from the execution of a judgment. Sovereign immunity not only protects the pockets of the States' treasuries, but also prevents the States from being hauled into court against their will. *See, e.g., Seminole Tribe*, 517 U.S. at 58. A state's fundamental right to be immune

[13] Given Congress' presumed awareness of the Eleventh Amendment's bar to the district court's exercise of jurisdiction over the States, Congress did not intend for the Shipping Act to permit private actions against the States.

from suit is undermined the moment a private suit is filed against the nonconsenting state and the state is called upon to appear and answer the suit as an unwilling defendant, not when the state is asked to pay a judgment awarded against it. *See Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944) ("A state's *freedom from litigation* was established as a constitutional right through the Eleventh Amendment.").

Finding that the States' sovereign immunity is not implicated in private suits before federal administrative tribunals simply because a State could ignore any agency order due to insufficient enforcement authority "does not do justice to our system of federalism." (Pet. App. at 18a). It would be incredible to assume that a state officer who takes an oath to support and defend the Constitution and laws of the United States would be unwilling to obey an order of a federal agency. *See id.* As the Fourth Circuit found below, the proper question is not whether the Commission has the power to enforce its orders, but rather "whether a private party can subject an unconsenting state to an adversarial proceeding." *Id.*

C. Allowing the Commission to adjudicate private party complaints against a nonconsenting state would improperly raise up proceedings which were "anomalous or unheard-of" when the Constitution was adopted.

The Commission argues that because private complaint proceedings before federal administrative agencies did not exist at the time the Constitution was adopted and because no express constitutional provision addresses sovereign immunity from federal administrative proceedings, this Court must conclude that such proceedings do not implicate sovereign immunity guarantees. (Br. for Comm'n at 27). This argument should be rejected. The original Constitution is silent on the question of the sovereign immunity for both the States and the United States.

Indisputably, "no anomalous or unheard-of proceedings . . . were to be raised up by the Constitution." *Hans*, 134 U.S. at 18, *quoted in Alden*, 527 U.S. at 727. The Commission's argument concedes that private suits against a state filed with a federal administrative agency did not exist at the time the States adopted the Constitution. This fact further compels the conclusion that private litigants may not utilize these "anomalous" and "unheard-of" proceedings to strip the States of their sovereign immunity.

The Commission unsuccessfully attempts to distinguish *Alden*, which provides persuasive support for the State's position here. The Commission argues that *Alden* does not support an assertion of sovereign immunity from "Executive Branch regulatory authority." (Br. for Comm'n at 29). However, the Commission mischaracterizes the private complaint proceedings. As previously discussed and established, the Commission does not exercise executive discretion in adjudicating private complaints under the Shipping Act.[14] To the contrary, the administrative law judge must hear and adjudicate the complaint, and the ALJ's functions as well as the nature of the proceedings are judicial.[15] The controlling principle from *Alden* is that a private party may not hale an unwilling state into an adversarial proceeding, "regardless of the forum." *See Alden*, 527 U.S. at 749.[16]

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[14] The Commission exercises its executive, regulatory authority when it initiates its own investigation and files suit under the Shipping Act, but not when a private party files a complaint which the Commission *must* adjudicate.

[15] *See* discussion *supra* Part III.B.1. regarding private complaint proceedings and the role of the administrative law judge who presides over the proceedings.

[16] The Commission's reliance upon *Nevada v. Hall* is also misplaced. In *Hall*, this Court rejected Nevada's claim of sovereign immunity from a private suit brought in California state court. The suit alleged violations of California state law, which allowed private suits against other states. *Hall*, 440 U.S. at 411-12. *Hall* involved whether one state may abrogate another state's immunity, and not whether the United States, through Congress, may abrogate the States' immunity in state courts. Thus, this Court noted that the cases holding that the States are never amenable to suits without their consent "all . . . concerned questions of federal-court jurisdiction and the extent to which the States . . . authorized federal suits against themselves" when they ratified the Constitution. *Id.* at 420-21. This Court narrowly interpreted *Hall* in *Alden*, when it held that the States enjoy sovereign immunity from private suits in their own courts. In rejecting *Hall* as a basis for denying the States their sovereign immunity in their own courts, this Court explained that the federal government can claim only those powers granted to it by the Constitution, and concluded that Congress had no right to abrogate the States' immunity in their own courts. *See Alden*, 527 U.S. at 739. *Hall* does not help the Commission in the present case for similar reasons—"the decision addressed neither Congress' power to subject States to private suits nor the States' immunity from suit in" federal administrative proceedings. *See Alden*, 527 U.S. at 739.

D. The public rights doctrine does not affect the States' sovereign immunity.

The Commission erroneously relies upon the public rights doctrine[17] as support for its position that the States' sovereign immunity is not implicated by private complaint proceedings before federal administrative tribunals. The argument improperly mingles two separate and distinct constitutional principles.

The Commission asserts the unsupported argument that because the public rights doctrine prevents Congress from impermissibly eroding the judicial power of Article III courts by placing judicial authority in an Article I tribunal, the doctrine is also sufficient to ensure "that Congress

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[17] The public rights doctrine provides a justification for Congress' delegation of certain claims to non-Article III tribunals in certain circumstances. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (observing that "[i]n essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced").

cannot undermine the principles of sovereign immunity that protect States from the jurisdiction of Article III courts." (Br. for Comm'n at 35). The Commission is apparently arguing that because the public rights doctrine limits Congress' authority to grant Article I tribunals the judicial authority vested in Article III courts, an action brought against a nonconsenting state in an Article I tribunal is not a judicial action and does not implicate sovereign immunity concerns. The Commission's argument would transform the public rights doctrine into a vehicle for overriding the States' sovereign immunity by permitting Article I tribunals to decide adversarial cases that are beyond the reach of Article III courts.

This argument is merely another articulation of the Commission's mistaken position that the States' sovereign immunity is limited by the forum in which the action is brought—a position soundly rejected by this Court two terms ago. *See Alden*, 527 U.S. at 749. As the Fourth Circuit properly found below, "[i]nvoking the public rights doctrine, however, does not change the fact that a private party simply cannot commence an adversarial proceeding against an unconsenting state." (Pet. App. at 18a n.*).

In rejecting the Commission's public rights argument, the Fourth Circuit recognized that Article I tribunals can and do exercise the judicial power of the United States and are limited in their exercise of that power by "the constitutional jurisdiction of Article III courts." *Id.* The public rights doctrine itself rests on the supervision of Article I tribunals by Article III courts. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853-54 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (1985); *Crowell v. Benson*, 285 U.S. 22, 61 (1932). "Because an Article III court would not have jurisdiction due to state sovereignty, [Supreme Court] cases suggest that sovereign immunity would also bar Congress from permitting a federal

agency to force a state to defend a claim against a private party." (Pet. App. at 19a n.* (referring to cited cases decided by this Court)).

The Commission's public rights argument is an impermissible attempt to borrow concepts from one constitutional principle and apply them on an unrelated front. The constitutional guarantee to litigants that a case or controversy within the scope of the judicial power of the United States will be decided by or under the supervision of an Article III judge in an Article III court is wholly separate and finds its roots in a different place than the States' fundamental right of immunity from private suits without their consent.

For example, the legitimacy of federal bankruptcy proceedings relies, in part, on the public rights doctrine and this Court's holdings that Article III power can in certain circumstances be applied by a non-Article III judge, *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), yet federal courts uphold the States' assertions of their sovereign immunity in bankruptcy proceedings. *See, e.g., NVR Homes*, 189 F.3d at 450-54; *Texas v. Walker*, 142 F.3d 813, 823 (5th Cir. 1998) (noting that adversary proceedings initiated against a state during the bankruptcy process would offend the Eleventh Amendment)

The public rights doctrine simply has no application to the question before the Court, and the Court should decline the invitation by the Commission and the United States to apply it in this context.

IV. NONE OF THE EXCEPTIONS TO STATE SOVEREIGN IMMUNITY RECOGNIZED BY THIS COURT APPLIES IN THIS CASE.

Although this Court has recognized limitations "implicit in the constitutional principle of state sovereign immunity," *Alden*, 527 U.S. at 755, none of the exceptions applies here.

A. Congress did not abrogate the States' immunity in the Shipping Act.

A state's sovereign immunity does not apply where Congress has validly abrogated the States' immunity pursuant to section 5 of the Fourteenth Amendment. *See Alden*, 527 U.S. at 756. Whether Congress has validly abrogated the States' immunity requires a two-step analysis. First, did Congress unequivocally express an intent to abrogate the States' immunity in the Shipping Act? *See, e.g., Kimel*, 528 U.S. at 73 (holding that Congress' intent must be "unmistakably" clear). Second, if the answer to question one is yes, did Congress act pursuant to a valid exercise of its abrogation power? *See, e.g., Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-64 (2001). The Court finds that Congress validly abrogated the States' sovereign immunity only when both questions are answered affirmatively.

1. *The Shipping Act contains no clear expression of congressional intent to abrogate the States' immunity.*

The Eleventh Amendment is an essential component of our Constitution's structure; and therefore, the test for determining whether Congress has expressed its intent to abrogate the States' immunity is a stringent one. *See Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989). "Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.'" *Seminole Tribe*, 517 U.S. at 56 (quoting *Blatchford*, 501 U.S. at 786).

The Shipping Act contains no expression of any congressional intent to abrogate the States' sovereign immunity from suits filed by private parties. *See generally* Shipping Act of 1916, 46 U.S.C.A. app. §§ 801-842 (West 1975 & Supp. 2001); 46 U.S.C.A. app. §§ 1701-1719. The Act contains no reference to either the Eleventh Amendment or to sovereign immunity. Given the stringent standard required by this Court, Congress certainly knows how to express its intent to

abrogate, and the absence of any abrogation language is conclusive evidence that Congress did not intend to abrogate the States' immunity through the Shipping Act.[18]

Because Congress did not express any intent to abrogate the States' sovereign immunity in the Shipping Act, this case does not call into question any exercise of congressional power. The issue in this case—whether a State retains its sovereign immunity from private suits before federal administrative tribunals—does not address any specific congressional exercise of its abrogation powers. Contrary to the Commission's assertion, a positive answer to this question does not impact the constitutionality of the Shipping Act.

The Commission boldly states: "The court of appeals held that Congress exceeded the scope of its authority when it enabled private persons to initiate proceedings before the Commission by complaint." (Br. for Comm'n at 17). This statement is untrue and reflects a misreading of the Fourth Circuit's decision. Because Congress never expressed any intent to abrogate the States' sovereign immunity under the Shipping Act, the Fourth Circuit did not examine any congressional exercise of its abrogation authority. Further, the Fourth Circuit did not find that private complaint proceedings in general are unconstitutional. The Shipping Act remains intact under the Fourth Circuit's decision because the court merely held that private complaint proceedings before the Commission implicate the States' sovereign immunity.

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[18] For example, in *Kimel* and *Garrett*, this Court found that Congress clearly expressed its intent to abrogate the States' immunity under the ADEA and ADA, respectively. Because the Court found that Congress' attempted abrogation exceeded the scope of its authority, the Court found the abrogation contained in those statutes unconstitutional.

2. *The Shipping Act would not constitute a valid exercise of Congress' abrogation power.*

In determining whether Congress has the power to abrogate the States' immunity, the question for the Court is a narrow one—"was the act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?" *Seminole Tribe*, 517 U.S. at 1125 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976)).

This Court recognizes Congress' power to abrogate the States' sovereign immunity only in appropriate legislation enacted pursuant to section 5 of the Fourteenth Amendment. *See, e.g., Fitzpatrick*, 427 U.S. at 453; *see also Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639-40 (1999). However, no meritorious argument can be made that Congress enacted the Shipping Act to protect substantive rights guaranteed by the Fourteenth Amendment. The Shipping Act nowhere identifies any violations of substantive rights which it aims to remedy and protect. Thus, any intent to abrogate the States' immunity through the Shipping Act would clearly be pursuant to Congress' Article I powers to regulate ocean borne commerce. The Commission concedes that Congress enacted the Shipping Act because "the regulation of ports" was "essential to protecting the nation's oceanborne commerce." (Pet. App. at 33a). *Seminole Tribe*, however, forecloses any attempt by Congress to abrogate the States' immunity pursuant to Article I. *See Seminole Tribe*, 517 U.S. at 72-73; *see also Kimel*, 528 U.S. at 78-79. Therefore, Congress did not abrogate the States' sovereign immunity through the Shipping Act.

B. No other recognized exception to sovereign immunity applies in this case.

Neither the Commission nor the United States challenges the right of the Ports Authority, as an arm of the State, to assert the sovereign immunity of the State of South Carolina. In *Ristow*, the Fourth Circuit held that the Ports Authority is "the alter ego of the State of South Carolina," and therefore, is entitled to

Eleventh Amendment immunity. *Ristow*, 58 F.3d at 1053-55 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). Moreover, it is undisputed that the State of South Carolina has not waived its immunity from or consented to private suits for alleged violations of the Shipping Act.

Although a state does not enjoy immunity in a suit filed by the federal government or another state, *see Alden*, 527 U.S. at 755-56, a private citizen filed this action against the Ports Authority. Sovereign immunity also does not bar suits against state officers where the complaint seeks only injunctive or declaratory relief to remedy an ongoing violation of federal law. *Ex parte Young*, 209 U.S. 123, 167 (1908). Maritime Services, however, has not named any state officers, and its complaint seeks monetary relief against the State. (J.A. at 7, 15-16). Finally, sovereign immunity does not apply in certain private suits against state officials individually, *Alden*, 527 U.S. at 757, but Maritime Services does not name any state officer in its complaint. (J.A. at 7). Thus, no exception to South Carolina's constitutional right to assert its immunity applies in this case.

C. The federal interest in uniform regulation of maritime matters does not support an additional exception to the States' constitutional right to sovereign immunity.

The Commission invites the Court to create a new exception to the doctrine of sovereign immunity by holding that the federal interest in maritime commerce can override the States' sovereign immunity. (Br. for Comm'n at 29-33). The Fourth Circuit properly refused this invitation. (Pet. App. at 22a-24a). As the Court has repeatedly recognized, the States' sovereign immunity applies equally to proceedings in the admiralty and maritime context. *See Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 488-90 (1987); *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 698-99 (1982) (opinion of Stevens, J.); *In re New York*, 256 U.S. 490,

497-98 (1921). Thus, the States' immunity from suit applies regardless of any "national uniformity in the regulation of maritime commerce." (Br. for Comm'n at 33).

In rejecting the Commission's invitation to create a new exception to sovereign immunity based upon the federal interest in uniform regulation of maritime matters, the Fourth Circuit followed *Seminole Tribe's* clear instruction "that a strong federal interest in a particular subject cannot determine the application of sovereign immunity to a lawsuit." (Pet. App. at 22a). Similarly,

> [T]he fact that the Constitution assigns the federal government a primary role in the regulation of maritime commerce does not mean that Congress can authorize a private party to bring a complaint against an unconsenting state. Once sovereign immunity applies, the only exceptions are those recognized in *Alden*.

Id. at 23a.

The Commission's ancillary argument that the States must be stripped of their sovereign immunity because private complaint proceedings are necessary "regulatory tool[s] to ensure that state marine terminals comply with the Shipping Act's requirements," [19] is equally without merit. (Br. for Comm'n at 11). The Commission erroneously suggests that its lack of resources justifies overriding the States' constitutional right to assert its sovereign immunity. *Id.* at 37.

A sovereign's assertion of its immunity does not depend upon the potential impact on the forum in which it is asserted. The States are clothed with the protections of immunity from suit by private parties "regardless of the forum," *Alden*, 527 U.S.

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[19] The United States, however, concedes that the Fourth Circuit's decision "should have little practical significance for the enforcement of the Shipping Act." (Br. for United States in Opp'n to Pet. for Cert. at 11); *see also id.* at 20 (ruling will have little effect on the Commission's enforcement of the Act); *id.* at 21 n.9 (ruling is "unlikely to have any meaningful practical effect").

at 749, and regardless of a *claim* that such immunity might impede the manner in which the forum operates. Sovereign immunity is a constitutional guarantee, overriding any and all subordinate considerations.

In any event, application of the doctrine of sovereign immunity to the Commission's administrative proceedings will not impair its ability to carry out its duties in any respect. First, regardless of the holding in this case, the Commission remains free to "bring a complaint in its own name." (Pet. App. at 23a (citing 46 U.S.C.A. app. § 1710(c)). State-owned marine terminals will still be required to comply with the Shipping Act's provisions designed to ensure the existence of an efficient and economic transportation system in the Nation's ocean borne commerce.[20] 46 U.S.C.A. app. § 1701(2).

The Commission relies upon *California v. United States*, 320 U.S. 577, 586 (1944), in which this Court held that the Shipping Act applies to state marine terminals, and claims that the case underscores a "crucial" need for "both public and private marine terminals [to] be regulated by the Act." (Br. for Comm'n at 37). However, the Commission fails to

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[20] Specifically, the Act requires marine terminal operators "to establish, observe, and enforce just and reasonable regulations and practices," 46 U.S.C.A. app. § 1709(d)(1), and to refrain from unreasonably prejudicing or preferring any person, *id.* § 1709(d)(2). If a ports authority, including a state ports authority, violates these (or any other) provisions of the Shipping Act, the Commission is statutorily authorized to investigate the alleged violations, either upon its own initiative or upon information supplied by a private party. *Id.* § 1710(c); *see also* 46 C.F.R. § 501.5 (responsibilities of the Bureau of Enforcement); 46 C.F.R. §§ 502.281-291 (nonadjudicatory investigations). If the Commission's investigation finds a violation of the Act, the Commission may issue a cease-and-desist order, assess penalties, or both. 46 U.S.C.A. app. §§ 1713 (issuance of orders) & 1712(a) (allowing penalties of up to $5,000 per violation and $25,000 for willful violations). In the last decade, the Commission has initiated over 2,000 formal investigations and collected over $66 million in civil penalties. *See* 1990-2000 FED. MAR. COMM'N ANN. REPS. (Appendix at 3a).

recognize the pivotal distinction between *California* and the instant case. In *California*, the United States—not a private citizen—commenced suit against the State. This distinction is significant and highlights the fundamental difference between a valid exercise of the federal government's authority over the States and an unconstitutional attempt by a private party to play the role of the United States.[21] As the Fourth Circuit properly recognized below, "[t]he fact that sovereign immunity applies to private proceedings means only that the federal government, not a private party, must vindicate the federal interest when a state is involved." (Pet. App. at 23a).

Second, the Commission's claim that its regulation of ocean borne commerce depends upon oversight through private party suits is irrelevant to the efficacy of the doctrine of sovereign immunity. Alleged insufficient resources cannot serve as a basis for stripping the States of their constitutional right to immunity from private party suits. The doctrine of sovereign immunity, embodied in the Eleventh Amendment, requires the Commission to regulate through its own constitutionally permissible investigatory procedures as provided by Congress in the Shipping Act. If the Commission lacks adequate personnel to regulate effectively in this manner (and there is no such showing here), it should seek additional resources from Congress. "This process ensures that any federal interest is protected in a politically accountable manner." (Pet. App. at 24a).

A legislative need cannot erode a constitutional guarantee. Accordingly, the federal interest in maritime commerce does not trump the States' sovereign immunity.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Fourth Circuit.

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[21] *See supra* note 11 and accompanying text.

Respectfully submitted,

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January 11, 2002

APPENDIX A

STATUTORY PROVISIONS

Section 2(2) of the Shipping Act of 1984, 46 U.S.C. app. § 1701(2), provides:

§ 1701. Declaration of policy

The purposes of this chapter are—

. . .

(2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;

Sections 10(d)(1) and (d)(2) of the Shipping Act of 1984, 46 U.S.C. app. §§ 1709(d)(1) & (d)(2), provide:

§ 1709. Prohibited acts

(d) Common carriers, ocean transportation intermediaries, and marine terminal operators

(1) No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

(2) No marine terminal operator may agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, any common carrier or ocean tramp.

Section 13(a) of the Shipping Act of 1984, 46 U.S.C. app. § 1712(a), provides:

§ 1712. Penalties

(a) Assessment of penalty

Whoever violates a provision of this chapter, a regulation issued thereunder, or a Commission order is liable to the United States for a civil penalty. The amount of the civil penalty, unless otherwise provided in this chapter, may not exceed $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $25,000 for each violation. Each day of a continuing violation constitutes a separate offense. The amount of any penalty imposed upon a common carrier under this subsection shall constitute a lien upon the vessels operated by that common carrier and any such vessel may be libeled therefore in the district court of the United States for the district in which it may be found.

APPENDIX B

Federal Maritime Commission Enforcement Activities: 1990-2000.

Fiscal Year	Formal Investigations Initiated by the FMC	$ Collected in Civil Penalties
1990	289	$ 24,982,901.28
1991	191	$ 21,791,650.09
1992	308	$ 653,712.39
1993	295	$ 2,063,435.82
1994	396	$ 870,463.88
1995	134	$ 381,912.63
1996	50	$ 876,959.68
1997	163	$ 1,943,349.04
1998	290	$ 3,869,005.96
1999	126	$ 5,411,030.17
2000	54	$ 3,232,481.12
Total	**2296**	**$ 66,076,902.06**

Source: Federal Maritime Commission, Annual Reports, 1990-2000

APPENDIX C

Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices

Federal agencies are not included in the phrase "person or other entity" in the antidiscrimination provision of the Immigration Reform and Control Act, 8 U.S.C. § 1324b(a)(1). Accordingly, the Special Counsel for Immigration Related Unfair Employment Practices is without authority to bring discrimination charges against federal agencies.

August 17, 1992

MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF THE NAVY

This memorandum responds to your request that we reconsider our opinion of May 2, 1990, in which we concluded that the Antidiscrimination Provision of the Immigration Reform and Control Act, 8 U.S.C. § 1324b(a)(1), authorizes the Special Counsel for Immigration Related Unfair Employment Practices to investigate and prosecute charges of employment discrimination by federal agencies. After evaluating your request for reconsideration and the response of the Special Counsel, we conclude that the federal government is not a "person or other entity" covered by the Antidiscrimination Provision. We withdraw our earlier opinion.[1]

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[1] *See* Memorandum for Andrew M. Strojny, Acting Special Counsel, from Lynda Guild Simpson, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Department of Defense Cooperation with Investigation of Immigration Related Unfair Employment Practice*, (May 2, 1990) ("OLC Memorandum"); Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Craig S. King, General Counsel, Department of the Navy (May 17, 1990) ("Navy Memorandum"); Memorandum for J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel, from

I.

The Antidiscrimination Provision of the Immigration Reform and Control Act ("IRCA") provides that:

> [i]t is an unfair immigration-related employment practice for a *person or other entity* to discriminate against any individual (other than an unauthorized alien . . .) with respect to the hiring, or recruitment or referral for a fee, of [an] individual for employment or the discharging of [an] individual from employment—
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a protected individual . . . , because of such individual's citizenship status.

8 U.S.C. § 1324b(a)(1) (emphasis added). Under IRCA's enforcement provisions, the Special Counsel for Immigration Related Unfair Employment Practices ("Special Counsel") may file charges against any "person or other entity" for violation of the Antidiscrimination Provision. Such charges initially come before an administrative law judge ("ALJ") within the Department of Justice. *Id.* § 1324b(d)(1). In the event that the Special Counsel does not file charges with the ALJ within a specified time, the private claimant may do so directly. *Id.* § 1324b(d)(2).

If the ALJ finds that the defendant "person or other entity" has violated the Antidiscrimination Provision, the ALJ may order injunctive relief, back pay, and civil penalties. *Id.* § 1324b(g)(2)(B)(iii)-(iv). Any "person aggrieved" by the ALJ's order may seek review in the appropriate court of appeals, *id.* § 1324b(i)(1), and the district court may enforce the ALJ's order on petition by the Special Counsel or by the private claimant. *Id.* § 1324b(j)(1).

Andrew M. Strojny, Acting Special Counsel (June 1, 1990) ("Special Counsel Memorandum").

The events that gave rise to our consideration of this matter began when Dr. Jacob Roginsky, a naturalized United States citizen who emigrated to this country from the Soviet Union, filed allegations with the Special Counsel that the Navy had engaged in immigration-related unfair employment practices prohibited by the Antidiscrimination Provision. The Special Counsel commenced an investigation into Dr. Roginsky's charges. The Navy declined to cooperate with this investigation, arguing that the Antidiscrimination Provision does not apply to federal agencies and, hence, that the Special Counsel lacked authority to investigate. Acting on a request from the Special Counsel, we issued our opinion of May 2, 1990, in which we concluded that the Special Counsel had authority to pursue the investigation. The Navy then requested that we reconsider our opinion. *See* Navy Memorandum at 13; *see also* Special Counsel Memorandum at 1.

Thereafter, Dr. Roginsky filed an administrative claim directly against the Navy. As a result, the Special Counsel no longer had authority to file an administrative claim on behalf of Dr. Roginsky. *See* 28 C.F.R. § 44.303(d). We also understand that the dispute involving Dr. Roginsky has been settled. The precise question addressed by our opinion of May 2, 1990—whether the Special Counsel may investigate the charges of immigration-related unfair employment practices brought by Dr. Roginsky against the Navy—thus is no longer at issue.

The Special Counsel informs us that the complaint by Dr. Roginsky was the first in which the Special Counsel has been required to address the applicability of IRCA to a federal government department or agency. Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Andrew M. Strojny, Acting Special Counsel at 3 (May 7, 1990). The Special Counsel also notes that "[b]ecause the overwhelming majority of federal jobs are restricted [to United States citizens] by statute, regulation or

executive order . . . there cannot be a very large number of meritorious charges." Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Andrew M. Strojny, Acting Special Counsel at 7 (Apr. 27, 1990).[2] We nonetheless reconsider the interpretation of IRCA set forth in our earlier opinion because the applicability of that act to federal agencies is an issue of importance.

II.

The applicability of IRCA to federal agencies turns on whether federal agencies are "person[s] or other entit[ies]" within the meaning of the Antidiscrimination Provision. The phrase "person or other entity" is not defined in IRCA. This broad language might ordinarily be understood to include not only natural persons but virtually all organizations, including public agencies. Our earlier opinion, in fact, rested primarily on the view that "the plain meaning of the phrase 'person or other entity' encompasses . . . 'entit[ies]' such as the United States Government." OLC Memorandum at 3.

On further review, however, we believe that our earlier analysis did not adequately address the sovereign immunity implications of a "plain meaning" interpretation of the phrase and, in particular, on the settled rules of statutory construction that have evolved to preserve sovereign immunity. It is well established that:

> [s]tatutory provisions which are written in such general language that they are reasonably susceptible to being construed as applicable both to the government and to private parties are subject to a rule of construction which

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[2] The Special Counsel has informed us that one other "former Soviet citizen has filed a charge against the [Department of Defense]" and that this investigation is "on hold" pending reconsideration of our May 2, 1990 opinion. *See* Memorandum for J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel, from Andrew M. Strojny, Acting Special Counsel at 2 (Aug. 15, 1990).

> exempts the government from their operation in the absence of other particular indicia supporting a contrary result in particular instances.

3 Norman J. Singer, *Sutherland on Statutory Construction*, § 62.01 (5th ed. 1992 rev.); *accord United States v. United Mine Workers of America*, 330 U.S. 258, 272 (1947); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). Therefore, the phrase "person or other entity" should not be read to include federal agencies in the absence of affirmative evidence that Congress intended that they be included. As discussed below, not only is there no evidence that Congress intended to include federal agencies within the phrase "person or other entity," there is considerable evidence that Congress did not intend federal agencies to be included in this term.

III.

Enforcement of the Antidiscrimination Provision against the federal government plainly would implicate the sovereign immunity of the United States. Sovereign immunity bars an action against the United States if "'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration' . . . or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963)(quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949)).[3] The Antidiscrimination Provision authorizes ALJs to enter an order awarding back pay, which would

[3] We assume for purposes of this opinion that sovereign immunity would not bar administrative proceedings in which one executive agency would press charges against another executive agency and final decisional authority would be vested in the Executive. *See* Special Counsel Memorandum at 8-9, 19. We do not believe, however, that this assumption bears on the specific question presented here, because disputes under IRCA are subject to judicial enforcement procedures and thus are not resolved entirely within the executive branch. *See supra* p. 122.

expend itself on the Treasury, or an order requiring the hiring of individuals, which would restrain the United States Government from acting or compel it to act. 8 U.S.C. § 1324b(g)(2)(B)(iii). It also provides for judicial enforcement of such orders by the district courts. *Id.* § 1324b(j). Therefore, the Antidiscrimination Provision may be applied to federal agencies only if Congress has waived the government's sovereign immunity against enforcement actions under section 1324b(j).[4]

In determining whether Congress has waived sovereign immunity, "[i]t is an error to suppose that the ordinary canons of statutory construction are to be applied." *Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1387 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983). In particular, the Supreme Court has held that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969); *see also United States v. Mitchell*, 445 U.S. 535, 538 (1980). This requirement of an unequivocal expression of a waiver of sovereign immunity has recently been reaffirmed in a number of decisions. *See United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992); and *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89,

[4] The Antidiscrimination Provision also contemplates judicial enforcement of civil penalties, 8 U.S.C. § 1324b(g)(B)(iv), (j), payable into the Treasury. The assessment of a civil penalty against a federal agency in a sense would *not* expend itself upon the fisc, because it would not have any net effect on the Treasury balance. Nor would the assessment of a civil penalty against an agency serve the goal of deterrence. Because there are no appropriations in agency budgets for payment of IRCA penalties, the funds to pay such penalties presumably would be drawn from the general fund of the Treasury, 31 U.S.C. § 1304(a), and then returned to that same fund as miscellaneous receipts, 8 U.S.C. § 1356(c), with no effect whatsoever on the defendant agency. The fact that application of the Antidiscrimination Provision to federal agencies would render one aspect of the enforcement scheme ineffectual provides independent reason to question the application of the provision to these agencies.

95 (1990).[5] As a general matter, waivers of sovereign immunity take the form of explicit statements that the federal government is subject to a statutory rule or will be subject to suit.[6] Statutes explicitly providing a right of action against a federal entity or conferring jurisdiction on a court to resolve

[5] The Special Counsel cites two Supreme Court cases on the standard for waivers of sovereign immunity, but neither is relevant in the present context. *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381 (1939), involved a claim against a government corporation. It has long been recognized that government corporations may be sued in the same manner as private corporations. *Id.* at 390. The application of IRCA contemplated here, however, would involve neither a government corporation nor any other specialized organizational form the use of which would subject the United States to suit. In *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512 (1984), the scope rather than the existence of a waiver of sovereign immunity was at issue. The Court cited *Keifer* for the proposition that "intent to waive immunity . . . can only be ascertained by reference to underlying congressional policy." *Id.* at 521.

[6] *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e16(a); Clean Air Act, 42 U.S.C. §§ 7418(a), 7604(a)(1); Clean Water Act, 33 U.S.C. §§ 1323, 1365; Resource Conservation and Recovery Act, 42 U.S.C. §§ 6961, 6972(a)(1)(a); Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9620(a).

The Secretary of Labor's decision in *Pogue v. Department of the Navy*, Secretary of Labor Case No. 87-ERA-21 (May 10, 1990), on which the Special Counsel relies, is not to the contrary. The determination that sovereign immunity does not shield the federal government from the "whistleblower" provision of CERCLA rested on the applicable statutory definition of "person," which expressly includes the "United States Government." 42 U.S.C. § 9601(21). Congress, moreover, expressly provided that "[e]ach department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter [including the whistleblower provision] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity." *Id.* § 9620(a)(1).

claims against the federal government also have been held to constitute waivers of sovereign immunity.[7]

IRCA does not contain any waiver of sovereign immunity in the form of a substantive rule that explicitly applies to the United States. Nor is there any specific grant of jurisdiction to resolve claims against the federal government. In these respects, the contrast between IRCA and Title VII of the Civil Rights Act of 1964 is especially instructive on Congress's intent in enacting IRCA. Unlike in IRCA, Congress expressly brought within the ambit of Title VII federal "executive agencies as defined in section 105 of title 5," 42 U.S.C. § 2000e-16(a), and it did so because otherwise a claimant would have to "overcome a U.S. Government defense of sovereign immunity." S. Rep. No. 415, 92d Cong., 1st Sess. 16 (1971). The absence of any reference to the federal government in IRCA is particularly significant in light of the settled law prior to IRCA's enactment that Title VII provides the *exclusive* remedy against federal agencies for complaints of national origin discrimination. *See Brown v. General Services Admin.*, 425 U.S. 820, 829 (1976). Despite extensive discussion of the relationship between IRCA and Title VII with respect to private employers, there is no evidence in the committee reports on IRCA that Congress intended IRCA to supplement the exclusive Title VII remedy against federal agencies. *See* H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 69-70 (1986); *id.*, pt. II, at 12; *see also* Navy Memorandum at 11; *infra* pp. 127-28. Accordingly, we conclude that Congress has not waived the sovereign immunity of the United States for claims under IRCA.

[7] *See Schlafly v. Volpe*, 495 F.2d 273, 282 (7th Cir. 1974) (finding waiver of sovereign immunity in right of action to contest discriminatory suspension of federal financial assistance in 42 U.S.C. § 2000d-2); *McKenzie v. United States*, 536 F.2d 726, 728 (7th Cir. 1976) (finding waiver of sovereign immunity in express grant of jurisdiction to bankruptcy courts to resolve federal tax liability of bankrupt entities under 11 U.S.C. § 11(a)(2A)).

In our prior opinion, we relied upon the exception to the Antidiscrimination Provision of IRCA for discriminatory actions required by executive order, section 1324b(a)(2)(C), to support our conclusion that federal agencies were covered by IRCA. We reasoned there that "the creation of an exception for discrimination required by [executive] orders strongly suggests that Congress understood federal agencies otherwise to be within the scope of the antidiscrimination provision" because "executive orders govern the employment decisions of the federal government rather than those of private entities." OLC Memorandum at 4. It is clear that we were proceeding at that point in the opinion on an assumption that executive orders never govern actions of private employers. In fact, however, some executive orders do affect private parties. For example, Executive Order No. 10865, 3 C.F.R. § 62 (1960), *reprinted in* 50 U.S.C. § 435 note, effectively forbids certain private employers conducting business with the government from hiring individuals who, due to their citizenship status, could not obtain the requisite security clearance.[8]

[8] Section 1(a) of Executive Order No. 10865, requires the issuance of regulations to govern "releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, [government] contracts." These regulations require security clearances for private employees to whom classified information may be released. *See, e.g.*, 10 C.F.R. pt. 710 (security clearance program for contractors handling nuclear material); 32 C.F.R. pt. 155 (security clearance program for defense contractors).

The Special Counsel asserts that Congress enacted the exception for executive orders specifically to address Executive Order No. 11935, 3 C.F.R. 146 (1977), *reprinted in* 5 U.S.C. § 3301 note, which provides that "[n]o person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States." *See* Special Counsel Memorandum at 4. The Special Counsel cites no authority in support of this assertion, and we have discovered none.

Having focused on the fact that some executive orders do extend to private employers, we believe that the exception for "executive orders" must be understood as directed at "discrimination" by government contractors pursuant to executive orders such as No. 10865, not at the actions of federal government agencies. This is the more natural understanding of the exception, given that it appears among other exceptions that apply to discrimination by government contractors. It is merely one of several exceptions for decisions made on the basis of citizenship status that are "required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government." 8 U.S.C. § 1324b(a)(2)(C). Of course, when it is understood that the exception was included so as to exempt private employer activities required by law, the existence of the exception does not support the inference that federal agencies would otherwise be covered by the Antidiscrimination Provision.[9] The exception plainly does not

[9] The Special Counsel argues that, even if IRCA itself does not waive sovereign immunity, a private claimant nonetheless may obtain judicial enforcement of the Antidiscrimination Provision by invoking the waivers contained in the Administrative Procedure Act, the Federal Tort Claims Act, and the Tucker Act. *See* Special Counsel Memorandum at 10 n.7. The assertion that other avenues may be available for judicial enforcement of the substantive provisions of the Antidiscrimination Provision is not responsive to the conclusion that we reach above. Our point is not that the courts may never enforce a substantive rule of conduct against the federal government; rather, it is that the substantive rules of the Antidiscrimination Provision, read in light of longstanding principles of statutory construction, do not encompass governmental conduct.

Moreover, we are unaware of any evidence that Congress wished to include federal agencies within the Antidiscrimination Provision but to relegate claims against these agencies—unlike claims against private entities—to an enforcement scheme different from that set forth in the provision. The more plausible inference is that Congress did not intend the Antidiscrimination Provision to cover federal agencies in the first

constitute an "unequivocal" expression of congressional intent to waive the sovereign immunity of the United States.

To the extent that there is any evidence in the legislative history on the specific question presented here, it too suggests that Congress did not contemplate that federal agencies would be included under the Antidiscrimination Provision. First, there is no express discussion of the application of IRCA to federal agencies, which one would certainly expect to find if Congress intended to cover these agencies. Second, although the committee reports on the bills that became IRCA and on similar proposals from earlier Congresses include detailed estimates of the enforcement costs of the legislation to the federal government, they make no mention of compliance costs. *See* S. Rep. No. 485, 97th Cong., 2d Sess. 52-56 (1982); S. Rep. No. 62, 98th Cong., 1st Sess. 57-64 (1983); H.R. Rep. No. 115, 98th Cong., 1st Sess., pt. 1, at 99-107 (1983); S. Rep. No. 132, 99th Cong., 1st Sess. 57-66 (1985); H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 128-29 (1986). Had Congress understood that the federal government would come within IRCA, these reports almost certainly would have included cost estimates for federal agency compliance.[10]

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place. In fact, the provisions relied on by the Special Counsel would provide relief against federal agencies less complete than, or inconsistent with, the provisions in IRCA. The Administrative Procedure Act waives sovereign immunity for suits brought by persons "aggrieved by agency action" but permits only those suits that "seek[] relief *other than money damages*." 5 U.S.C. § 702 (emphasis added). The waivers in the Federal Tort Claims Act (28 U.S.C. § 1346(b)) and the Tucker Act (28 U.S.C. §§ 1346(a)(2), 1491) would permit damage actions but would provide for a sequence of judicial review—involving either the district court or the Claims Court—that is inconsistent with that provided in the Anti-discrimination Provision.

[10] The Supreme Court has recently stated that "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be

The Special Counsel relies primarily on a passage from the Senate Report on IRCA in support of his position that federal agencies are included within the act. The passage states that the phrase "person or other entity," as used in the Employer Sanction Provision, covers "individuals, partnerships, corporations and other organizations, nonprofit and profit, private and *public*, who employ, recruit, or refer persons for employment in the United States." S. Rep. No. 132, at 32 (emphasis added). Even if we were to discount the Supreme Court's statement in *Nordic Village* and accept the assertion that Congress could waive sovereign immunity through legislative history, we could not conclude that the mention of "public" employers in this passage compels the inclusion of federal agencies within the coverage of IRCA. States and municipalities may act as employers and many states operate employment agencies. All of these entities would be "public" employers and thus could well be the organizations referenced in the Senate Report.[11]

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supplied by a committee report." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (citations omitted). Our analysis of the legislative history is thus purely confirmatory.

[11] The Special Counsel also cites the House Report on IRCA, which states that the Employer Sanction Provision applies to "all employers regardless of the number of employees, as well as to those persons who recruit or for a fee refer undocumented aliens for employment." H.R. Rep. No. 682, at 56. This statement adds nothing to the statement in the Senate Report; in fact, unlike the Senate Report, the House Report does not even state that "public" entities are included within the Employer Sanction Provision.

Apart from legislative history, the Special Counsel observes that regulations promulgated by the Immigration and Naturalization Service for enforcement of the Employer Sanction Provision define the term "entity" to include "governmental bod[ies]." 8 C.F.R. § 274a.1(b). The regulation does not refer explicitly to the *federal* government, however, and in any event, administrative regulations "can neither enlarge nor diminish the scope of the waiver of immunity" set forth by Congress in

IV.

Our conclusion that the phrase "person or other entity" as used in the Antidiscrimination Provision does not include federal agencies is reinforced by the fact that a contrary construction would raise serious separation of powers issues. Were we to conclude that federal agencies are subject to the Antidiscrimination Provision, an officer within the Department of Justice, 8 U.S.C. § 1324b(c)(1), would have authority to sue other federal agencies in federal court. *Id.* § 1324b(j)(1) (authorizing Special Counsel to seek enforcement by the district court of ALJ orders). Such intra-executive branch litigation likely would contravene Articles II and III of the Constitution.

By its terms, Article II vests the entire executive power in the President. U.S. Const. art. II, § 1, cl. 1. As a necessary concomitant to this exclusive grant of power, the President has the authority to resolve intra-executive branch disputes in order to secure "that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Myers v. United States*, 272 U.S. 52, 135 (1926). Suits by one executive branch agency against another, however, would, in likely contravention of Article II, transfer the power to resolve such disputes from the President to the federal courts. *See generally Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131, 135-38 (1989).

Intra-executive branch lawsuits would also raise serious questions under Article III of the Constitution. Article III courts may resolve only those disputes in which there is a genuine "Case[]" or "Controvers[y]" involving a concrete

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the underlying statute. *Millard v. United States*, 16 Cl. Ct. 485, 490 (1989), *aff'd*, 916 F.2d 1 (Fed. Cir. 1990), *cert. denied*, 500 U.S. 916 (1991).

adversity of interests between the parties. U.S. Const. art. III, § 2. Given that there is ultimately but a single interest of the executive branch—that determined by the President—litigation between two executive agencies would not appear to involve the requisite adversity of interests to constitute a "Case[]" or "Controvers[y]" within the meaning of Article III. *See, e.g., Defense Supplies Corp. v. United States Lines Co.*, 148 F.2d 311, 312-13 (2d Cir.), *cert. denied*, 326 U.S. 746 (1945) (dismissing suit against United States by a corporation whose stock was wholly owned by the United States on ground that "this [is] . . . nothing more than an action by the United States against the United States . . . . [T]here is no real case or controversy."); *United States ex. rel. TVA v. Easement and Right of Way*, 204 F. Supp. 837, 839 (E.D. Tenn. 1962) ("[I]nter-agency disputes . . . are not subject to settlement by adjudication . . . . The settlement of interagency problems within the United States Government is not a judicial function but rather an administrative function."); 13 Op. O.L.C. at 138-141; *Proposed Tax Assessment Against the United States Postal Service*, 1 Op. O.L.C. 79, 81-82 (1977).[12]

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[12] The courts sometimes decide cases nominally between two executive branch bodies, where one of the parties in interest is a private entity not within the President's control. *See, e.g., United States v. ICC*, 337 U.S. 426 (1949) (United States in its proprietary status as a shipper sought from railroads monetary relief that had been denied by the Interstate Commerce Commission); *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954) (Secretary of Agriculture intervened in action by private agricultural interests before the ICC to recover for railroad overcharges); *Udall v. Federal Power Comm'n*, 387 U.S. 428 (1967) (Secretary of Interior intervened on behalf of private power company and municipality seeking Federal Power Commission approval of dam); *United States v. Federal Maritime Comm'n*, 694 F.2d 793 (D.C. Cir. 1982) (Department of Justice challenged ocean carriers' agreement that earlier had been approved by Federal Maritime Commission).

In an enforcement action brought by the Special Counsel against a federal agency, however, the United States would be the real party in

Interpreting the phrase "other entit[ies]" to include federal agencies would also raise the troublesome specter of litigation by the executive branch against coequal branches of the federal government, for there would be no principled basis on which to exclude the Congress and the judiciary from the reach of the Antidiscrimination Provision. Given the extraordinary nature of litigation by the executive branch—here, the Special Counsel—against coequal branches of the government, we hesitate to infer that such was authorized by Congress in the absence of affirmative evidence. This reticence is particularly appropriate given that Congress has taken great care to condition the applicability of other federal employment laws to itself and the judiciary.[13]

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interest on both sides of the litigation. The defendant would be an agency of the United States, and the real party in interest on the prosecution side would also be the United States, acting in its sovereign capacity. Only where the Special Counsel has declined to sue and a claimant brings suit directly against a "person or other entity" alleged to have engaged in discrimination, *see* 8 U.S.C. § 1324b(d)(2), could there exist the requisite concrete adversity of interests, because only in this circumstance would one of the litigants be beyond presidential control.

[13] For example, in enacting the Civil Rights Act of 1991, Congress substantially limited the procedural protections and enforcement provisions available to plaintiff-employees seeking various types of relief against Congress. *See* §§ 117, 301-314 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1080, 1088-95 (1991) (providing for procedures and remedies available to House and Senate employees under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16), and also providing for procedures and remedies for Senate employees under the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 633a), and the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12112-12114)).

Prior to enactment of the Civil Rights Act of 1991, Title VII barred executive branch agencies from discriminating on the basis of "race, color, religion, sex, or national origin," but that prohibition applied only to those few "units of the legislative and judicial branches . . . having

The problems with interpreting the phrase "person or other entity" in IRCA to include federal agencies would not be confined to the Antidiscrimination Provision alone. For example, many of the difficulties identified above would also exist with respect to the parallel Employer Sanction Provision of IRCA, which prohibits the hiring by any "person or other entity" of "unauthorized alien[s]." 8 U.S.C. § 1324a(a)(1).[14] Were we to conclude that federal agencies are "person[s] or other entit[ies]," the Employer Sanction provision would contemplate the imposition of mandatory civil penalties on the government, *id.* § 1324a(e)(4), requiring a waiver of sovereign immunity. It would permit the imposition of criminal penalties on a federal agency, *id.* § 1324a(f)(1), without any specific evidence that such an extraordinary measure was intended. Moreover, because the exclusive enforcement mechanism for such penalties would be a suit by the Attorney General against another federal agency, *id.* § 1324a(e)(9), the Attorney General could bring an enforcement action against another executive agency and indeed against the Congress or the judiciary.[15]

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positions in the competitive service." 42 U.S.C. § 2000e-16(a). The Fair Labor Standards Act was, and still is, similarly limited. 29 U.S.C. § 203(e)(2)(A)(iii).

[14] Congress enacted the Antidiscrimination Provision in response to the concern that employers might discriminate as a result of the Employer Sanction Provision against persons legitimately in this country. *See* H.R. Rep. No. 682, at 68. Thus, "[t]he antidiscrimination provisions of th[e] [statute] are a complement to the sanctions provisions, and must be considered in this context." H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 87 (1986). The same "person[s] or other entit[ies]" are subject to both the Antidiscrimination Provision and the Employer Sanction Provision.

[15] Application of the Employer Sanction Provision of IRCA to federal agencies would bar those agencies from hiring only two narrow classes of aliens not already barred by Exec. Order No. 11935, *see supra* note 9, and similar restrictions found in annual appropriations since 1943. *See, e.g.*,

The Supreme Court has admonished that constructions of a statute that would render it constitutionally suspect should be avoided where a reasonable alternative reading of the statute is available. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). Here, such a reading—under which the phrase "person or other entity" would not include the federal government—not only is reasonable but is consistent with established principles of statutory construction and sovereign immunity.

CONCLUSION

We conclude on careful reconsideration of the statutory text of IRCA, its structure, purpose, and legislative history that federal agencies are not included within the phrase "person or other entity" in 8 U.S.C. § 1324b(a)(1). Accordingly, the Special Counsel is without authority to investigate or to bring charges of immigration-related employment discrimination against federal agencies. Discrimination

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Treasury, Postal Service and General Government Appropriations Act, 1992, Pub. L. No. 102-141, § 607, 105 Stat. 834, 868-69 (1991) ("Appropriations Act for 1992") (current appropriation); 5 U.S.C. § 3101 note (listing prior appropriations). Specifically, such an application of IRCA would prohibit federal agencies from hiring for a position outside of the competitive service (*i.e.*, a position not covered by Exec. Order No. 11935), those few unauthorized aliens to whom compensation otherwise may be paid under an exception to appropriations legislation. Such individuals would have to be "person[s] in the service of the United States . . . who, being eligible for citizenship, ha[ve] filed . . . declaration[s] of intention to become . . . citizen[s] of the United States . . . and [are] actually residing in the United States," or "person[s] who owe[] allegiance to the United States," or foreign nationals of certain specified countries. Appropriations Act for 1992, § 607, 105 Stat. at 868-69. There is no evidence that Congress wished to subject federal agencies to the Employer Sanction Provision of IRCA to obtain this incremental additional coverage.

by federal agencies based upon national origin is fully redressable under Title VII of the Civil Rights Act of 1964, which by its terms applies to federal executive agencies.[16]

Our contrary opinion of May 2, 1990, is withdrawn.

JOHN C. HARRISON
Deputy Assistant Attorney General
Office of Legal Counsel

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[16] Title VII does not provide a remedy for employment discrimination based upon citizenship status. However, since 1943, annual appropriations acts passed by Congress have, with narrow exceptions, prohibited the use of appropriated funds to pay salaries to federal employees who are not "citizen[s] of the United States." *See, e.g.*, Appropriations Act for 1992, § 607, 105 Stat. at 868-69 (current appropriation); 5 U.S.C. § 3101 note (listing prior appropriations); *see also supra* note 15. As the Special Counsel observes, "the vast majority of federal civil service positions are open only to United States citizens." Special Counsel Memorandum at 4. Thus, there are only a limited number of circumstances in which there is even the potential for a cognizable claim of citizenship status discrimination.

Of course, our opinion does not preclude federal agencies, as a matter of policy, from continuing to adhere to the immigration status verification procedures prescribed by the Office of Personnel Management. *See* Federal Personnel Manual Supplement 296-33, Subch. 5-2.6a (1988) (requiring use of Standard Form I-9).

APPENDIX D

The following is an excerpt from pages 18-20 of the brief for the United States in *Hensel v. Office of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994):

ARGUMENT

I. THE IRCA DOES NOT WAIVE THE SOVEREIGN IMMUNITY OF THE UNITED STATES

In the administrative proceedings below, the VA Hospital argued that the ALJ did not have jurisdiction over it because the IRCA does not waive the federal government's sovereign immunity. *See* AR 2740-42, 4257-58. The ALJ found it unnecessary to address this issue given the holding that petitioner had failed to meet her burden in defending the motion for summary decision. AR 19.

Because the sovereign immunity issue determines this Court's jurisdiction with respect to the federal government, the court must decide it even though the ALJ declined to do so. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). Moreover, this Court can affirm on any ground supported by the record even if that ground did not form the basis of the ALJ's decision. *Aspinall v. United States*, 984 F.2d 355, 357 (10th Cir. 1993). This Court reviews the sovereign immunity issue *de novo*. *Sierra Club v. Lujan*, 972 F.2d 312, 314 (10th Cir. 1992).

"It has long been established that * * * the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *see* also *Sierra Club*, 972 F.2d at 314. Sovereign immunity extends to federal agencies and officers acting in their official capacities. *See Western Shoshone Business Council v. Babbit*, 1 F.3d 1052, 1058 (10th Cir. 1993); *see, e.g., Irwin v. Veterans Admin.*, 498 U.S. 89, 93-94 (1990).

Sovereign immunity bars an action if, among other things, "'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration' . . . or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Application of the IRCA to the VA Hospital in this case plainly would implicate sovereign immunity. Dr. Hensel seeks an order requiring the VA Hospital to hire her (AR 14), which would compel the government to act. She also seeks back pay (*id.*), which would expend itself on the United States Treasury. Therefore, sovereign immunity bars this action unless it has been waived.

As we show below, nothing in the text of the IRCA contains the unequivocal expression necessary to waive the federal government's sovereign immunity. The VA Medical Center, as a field office of the Veterans Administration, cannot be hailed into court under the jurisdictional provisions of the IRCA.[2]

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[2] We note that Respondent Oklahoma Health Services Center contends that it is protected by Eleventh Amendment immunity, and that the IRCA does not waive that immunity. This case involves a claim brought against Oklahoma by a private individual, and does not raise the issue of whether the United States could bring an action against a state for alleged violation of the IRCA. Accordingly, in resolving the state's argument for immunity in this case, the Court need not decide whether a claim brought by the Office of Special Counsel (a component of the Department of Justice) also would be barred by the Eleventh Amendment. With respect to any such claim, we note that the Supreme Court has stated that the Eleventh Amendment would not bar such an action. *See West Virginia v. United States*, 479 U.S. 305, 311-12 & n.4 (1987). In any event, the University's Eleventh Amendment argument does not affect our reliance upon and analysis of the sovereign immunity of the United States, which is broader than a state's Eleventh Amendment immunity. *See e.g., Missouri v. Jenkins*, 491 U.S. 274, 280-81 & n.3 (1989); *Reopell v. Commonwealth of Massachusetts*, 936 F.2d 12, 15 (1st Cir.), *cert. denied*, 112 S. Ct. 637 (1991)

Supreme Court, U.S.
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(19)

No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL MARITIME COMMISSION

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TABLE OF CONTENTS

		Page
I.	Cases considering the limitations on Congress' authority to abrogate the States' sovereign immunity from suit in federal or state court do not address the question presented in this proceeding	1
II.	The Commission does not exercise the judicial power of the United States, and its adjudication of a complaint is not the functional equivalent of a lawsuit	8
III.	The use of administrative adjudications to vindicate public rights does not undermine the States' immunity from suit	13
IV.	The issue whether the United States is immune from adjudicatory proceedings conducted by its own administrative agencies is not before this Court	16
V.	Immunity from Shipping Act adjudications would be inconsistent with the requirement of national uniformity in the regulation of maritime commerce	18
CONCLUSION		20

TABLE OF AUTHORITIES

	Page
Cases:	
Alden v. Maine, 527 U.S. 706 (1999)	3, 4, 5, 6, 7, 8, 11, 15, 16
Ayers, In re, 123 U.S. 443 (1887)	5
Bakelite Corp., Ex parte, 279 U.S. 438 (1929)	14
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)	7, 8, 9
California v. United States, 320 U.S. 577 (1944)	1, 3, 8, 18
Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986)	15
Far East Conf. v. United States, 342 U.S. 570 (1952)	16
FHA v. Burr, 309 U.S. 242 (1940)	17
Franchise Tax Bd. of Cal. v. United States Postal Serv., 467 U.S. 512 (1984)	17
Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991)	2, 3, 9, 15
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)	3
Granfinanciera v. Nordberg, 492 U.S. 33 (1989)	15
Hans v. Louisiana, 134 U.S. 1 (1890)	6
International Union v. Bagwell, 512 U.S. 821 (1994)	11
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	13
Marbury v. Madison, 1 Cranch 137 (1803)	13
Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272 (1855)	14

National Insurance Co. v. Tidewater Co., 337 U.S. 582 (1949)	15
Nevada v. Hall, 440 U.S. 410 (1979)	6, 8
New York, Ex parte, 256 U.S. 490 (1921)	7
Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	14
Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984)	7
Rascator Maritime S.A. v. Cargill, 25 F.M.C. 470 (1982)	11
Reno v. Condon, 528 U.S. 141 (2000)	3
SEC v. Chenery Corp., 332 U.S. 194 (1947)	11, 13
Seminole Tribe v. Florida, 517 U.S. 44 (1996)	1, 2, 3, 5, 6, 7, 14, 19
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998)	13
Tennessee Dept. of Human Serv. v. United States Dept. of Education, 979 F.2d 1162 (6th Cir. 1992)	16
Thomas v. Union Carbide, 473 U.S. 568 (1985)	13
United States v. Locke, 529 U.S. 89 (2000)	18, 19
United States v. Morrison, 529 U.S. 598 (2000)	7, 8
United States v. Texas, 143 U.S. 621 (1892)	12
West v. Gibson, 527 U.S. 212 (1999)	16, 17
Constitution, statutes, and regulations:	
U.S. Const.:	
Art. II, sec. 3	11
Art. III, sec. 2	13
Amend. XI	*passim*

Shipping Act of 1984, 46 U.S.C. app. 1701 *et seq.*:
1705(k) 12
1710(a) 11
1710(b) 12
1710(d) 12
1710(f) 12
1710(g) 11
1710(h)(1) 11, 12
1711(e) 10
1713(c) 10
1713(d) 10
1716(a) 11
Rules of Practice and Procedure, 46 C.F.R. Part 502 (2001):
502.62(a) 11
502.63 12
Miscellaneous:
Memorandum from John C. Harrington, Deputy Assistant Attorney General, Office of Legal Counsel, to the General Counsel, Department of the Navy (August 17, 1992) 18

REPLY BRIEF FOR THE FEDERAL MARITIME COMMISSION

I. Cases considering the limitations on Congress' authority to abrogate the States' sovereign immunity from suit in federal or state court do not address the question presented in this proceeding.

The South Carolina State Ports Authority (SCSPA) has conceded (Br. 3-4) that the Federal Maritime Commission retains regulatory jurisdiction over its operations, and that an administrative adjudication to determine whether it is in compliance with the Shipping Act of 1984 would be permissible. See *California v. United States*, 320 U.S. 577 (1944) (holding that the Shipping Act of 1916 applies to state-run ports). SCSPA contends, however, that it is entitled to sovereign immunity from an agency adjudication whenever the adjudication is initiated through the filing of a complaint by a private person. SCSPA relies (Br. 9-24) on several of this Court's opinions holding that Congress may not abrogate the States' traditional sovereign immunity from suit in the federal courts and in the States' own courts. SCSPA errs, however, in relying on cases that pertain to the scope of Congress' abrogation authority. The relevant inquiry in this proceeding is not whether a traditional sovereign immunity from suit has been abrogated; rather, it is whether state instrumentalities are immune from a regulatory procedure created by Congress and administered by an independent Executive Branch agency. Cases that address Congress' limited authority to abrogate the States' known and traditional sovereign immunity from suit in federal and state courts do not answer the question whether state sovereign immunity from Executive Branch regulatory adjudications would be consistent with the constitutional design.

1. This Court's opinion in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), does not support SCSPA's argument (Br. 13) that state instrumentalities are entitled to assert "sovereign immunity in federal administrative proceedings." In

Seminole Tribe, the Court faced a circumstance in which the States' sovereign immunity from suit was unquestionably implicated: a private suit filed in a federal district court. 517 U.S. at 52. The Court addressed whether Congress has the authority to abrogate the States' immunity from such a district court suit through a statute passed under the Indian Commerce Clause. *Id.* at 53. Because "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction," the Court held that Congress could not abrogate the States' immunity from suit. *Id.* at 72-73. While SCSPA contends (Br. 12) that the Court's reference in *Seminole Tribe* to "federal jurisdiction" was meant to include "federal administrative agencies sitting in an adjudicative capacity," it is clear from the context of the opinion that by "federal jurisdiction" the Court referred to jurisdiction exercised by federal courts pursuant to the "judicial power under Article III." 517 U.S. at 73. The Commission is not an Article III court, and, as we explain in our opening brief (Br. 20-23), it does not exercise the judicial power of the United States. See *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991); *id.* at 908-914 (Scalia, J., concurring in part and concurring in the judgment). See *infra* at 8-10. The reasoning in *Seminole Tribe*, therefore, was not directed to administrative adjudications like those heard by the Commission.

More generally, the concept of abrogation is not at all relevant to this case. The Commission's position is that constitutional principles of state sovereign immunity from suit do not apply in administrative adjudications, not that Congress has permissibly abrogated any preexisting immunity. See FMC Br. 27 ("there is nothing to indicate that the constitutional structure *implicitly* establishes state immunity from the Commission's adjudication of a privately-filed complaint"). The inquiry in *Seminole Tribe* whether Congress holds the authority to abrogate the States' established Eleventh Amendment immunity from suit in

federal district court is not pertinent to this case. See 517 U.S. at 59 (examining whether "the Act in question [was] passed pursuant to a constitutional provision granting Congress the power to abrogate" the States' Eleventh Amendment immunity).

For abrogation to be relevant, the application of sovereign immunity principles to the federal executive power must first be proved, and as we argue in our opening brief, a traditional state immunity from regulatory adjudications finds no basis in constitutional text, history or design. See FMC Br. 25-33. In the Shipping Act, Congress has established a regulatory system that includes the administrative adjudication of complaints by an "administrative board" exercising "executive power." *Freytag*, 501 U.S. at 909 (Scalia, J., concurring in part and concurring in the judgment). State-run ports are, by the Shipping Act's terms, subject to all of its requirements, see *California v. United States*, 320 U.S. at 585-586, including the adjudication of private complaints filed against them. To frame the issue in terms of abrogation assumes an answer to the question presented here – whether the States are immune from Executive Branch administrative adjudications in the first place.[1] SCSPA's analogy to established concepts of state sovereign immunity from judicial power is misplaced, however, as is its assumption that there is a preexisting state immunity from regulatory adjudications.

2. SCSPA places heavy reliance on *Alden v. Maine*, 527 U.S. 706 (1999). *Alden*, however, does not support SCSPA's argument that the States' immunity from suit is so broad that it applies in any "adversarial proceeding * * * in any forum."

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[1] It is important to note that SCSPA does not claim that it is immune from federal regulation. SCSPA Br. 4. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Reno v. Condon*, 528 U.S. 141 (2000). Rather, it asserts that principles of state sovereign immunity *from suit* apply in the administrative adjudication of a private complaint by the Commission, an independent Executive Branch agency.

Br. 12. The Court in *Alden* addressed the more narrow question whether the system of federalism established by the Constitution permits Congress to subject the States to suit in the States' own courts under a federal cause of action. 527 U.S. at 730-731. The Court observed that there is a "separate and distinct structural principle," apart from the Eleventh Amendment, which "inheres in the system of federalism" and which protects from abrogation the States' preexisting sovereign immunity from suit in their own courts, except where "the States were required to surrender this power to Congress pursuant to the constitutional design." *Id.* at 730-731. The Court explained that "the States *retain* immunity from private suit in their own courts," and examined whether Congress could abrogate that immunity by statute. *Id.* at 754 (emphasis supplied). See also *id.* at 713 ("the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution"); *id.* at 724 (the Constitution was understood "to preserve the States' traditional immunity from private suits"); *id.* at 742 ("in [the States'] own courts * * * more than any other, sovereign immunity was long established and unquestioned"). The Court found that the ratification of the Constitution did not contemplate a surrender of the States' immunity from suit in their own courts, and that Congress therefore lacked authority to abrogate the immunity. *Id.* at 754. *Alden* clarifies that Congress cannot exercise "plenary federal control of state governmental processes," because "the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself." *Id.* at 749.[2]

[2] The court of appeals therefore erred in holding that "*Alden* makes clear that any proceeding where a *federal officer* adjudicates disputes between private parties and unconsenting states" is not constitutionally permissible. Pet. App. 13a (emphasis supplied). The Court's opinion in *Alden* was not directed towards the adjudication of a complaint by a federal officer; it was concerned with a *state* court hearing a lawsuit against the state itself, pursuant to a federal statute. See *Alden*, 527 U.S. at 711-712.

The "separate and distinct structural principle" that confirms the States' sovereign immunity from suit in their own courts is, by definition, unrelated to the case currently before the Court. This structural principle is not concerned with administrative agencies created by Congress and it does not support SCSPA's suggested application of the States' settled immunity from "the coercive process of judicial tribunals at the instance of private parties," *In re Ayers*, 123 U.S. 443, 505 (1887), to an independent Executive Branch agency that does not exercise coercive judicial power. Accordingly, to maneuver around *Alden*'s inapplicability, SCSPA reduces the Court's opinion to a "public policy" test. Br. 11. By characterizing *Alden* as supplying confirmation that "the doctrine of sovereign immunity does not depend upon the forum, but rather on the identity of the defendant and the plaintiff" (Br. 10), SCSPA focuses solely on *Alden*'s result and overlooks the evidence and reasoning that supported the Court's conclusions.[3] In SCSPA's view (Br. 11-12), *Alden* was grounded on a conclusion that the States' sovereign immunity from suit attaches whenever a private party initiates an "adversarial proceeding" against a State. If this were true, the Court could have decided *Alden* without reference to the Founders' views respecting, and the historical circumstances of, the States' immunity in their own courts. Thus, the Court's recognition that the States' immunity in their own courts "was a principle *so well established* that no one conceived it would be altered by the new Constitution," 527 U.S. at 741 (emphasis supplied), and the Court's analysis of "the historical record" which clarifies that the States enjoyed a traditional immunity from suit in the courts of their creation, *id.* at 743, would have been unnecessary to its holding. It is apparent, however, that these points form the foundation of the Court's opinion, and

[3] Compare, *e.g.*, *Seminole Tribe*, 517 U.S. at 67 ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound").

that to view *Alden* in any other light is to engage in the very "ahistorical literalism" that *Alden* itself warns against. *Id.* at 730.

SCSPA's attempt to separate the result in *Alden* from its historical foundation and to minimize the opinion's concern with curtailing federal control over *state* judicial processes reveals the factual inapplicability of *Alden* to the case before the Court. It also underscores the absence of any evidence to support a constitutional principle of state immunity from regulatory adjudications in maritime commerce. See SCSPA Br. 18 (conceding that "the debates did not address the suability of a state by private parties before a federal administrative tribunal"). As we argue in our opening brief (Br. 17-29), SCSPA's conception of state immunity from adversarial proceedings finds no support in the text of the Constitution, in this Court's decisions addressing the Eleventh Amendment, or in any historical records. SCSPA Br. 12. Indeed, SCSPA's analytical collapse (Br. 34-36) of "suit[s] in law or equity," U.S. Const. amend. XI, into mere "adversarial proceedings" is divorced from all historical and legal context.

SCSPA's contentions are, moreover, inconsistent with *Nevada v. Hall*, 440 U.S. 410 (1979), in which the Court found that the Constitution does not explicitly or implicitly guarantee the States an immunity from suit in the courts of other States. A proceeding in a state court would be "adversarial," and *Hall* may consequently be understood as declining to constitutionalize state immunity from all adversarial proceedings. Finally, SCSPA's theory of state sovereign immunity from adversarial proceedings renders surplusage not only most of the rationale of *Alden*, but also that of virtually all of this Court's other opinions explaining the scope of the States' sovereign immunity from suit.[4] See, *e.g.*, *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (suits against

[4] We have addressed *Alden* and *Seminole Tribe* in some detail here because SCSPA's primary argument appears to be that those opinions are controlling in the case now before the Court. See SCSPA Br. 7 ("*Alden* commands the answer to the question presented in this case"); *id.* ("the rationale of *Seminole Tribe* requires the application of the doctrine of sovereign immunity to federal administrative proceedings"); *id.* at 9 ("no further authority is needed"); *id.* at 14 ("the only possible conclusion"). SCSPA's amici also rely on the abrogation principles set forth in *Alden* and *Seminole Tribe*. See Br. of Maryland *et al.* 5 ("Congress has no authority under the Shipping Act * * * to abrogate unilaterally the States' immunity"); Br. of Charleston Naval Complex 11 ("Because Congress cannot abrogate a state's sovereign immunity under Article I * * * Congress cannot use the FMC, an Article I creation, to permit a private citizen to sue a state") (citation omitted).

unconsenting states were not "contemplated by the constitution when establishing the judicial power of the United States"); *Ex parte New York*, 256 U.S. 490, 497 (1921) ("it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given"); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984) ("the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III"); *Blatchford v. Native Village of Noatak*, 501 U.S 775, 781 (1991) ("the judicial authority in Article III is limited by this sovereignty").

3. In the view of SCSPA (Br. 31) and its amici (Br. of Maryland *et al.* 11), this Court should assume that the Shipping Act's private complaint procedure is unconstitutional as applied to state instrumentalities unless "compelling evidence" can be brought forward to surmount this presumption. The Court has explained, however, that "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Application of SCSPA's "compelling evidence" standard in this case would turn on its head the presumption that an Act of Congress constitutes a valid exercise of congressional authority.

Because the States enjoy sovereign immunity from suits in their own judicial fora, it is indeed true that they may be unwillingly subjected to such suits by Congress only when "there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." *Alden*, 527 U.S. at 731 (quoting *Blatchford*, 501 U.S. at 781). That presumption applies to judicial proceedings from which the States enjoy a traditional immunity. See *Alden*, 527 U.S. at 724 ("the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits"); *Hall*, 440 U.S. at 415 ("[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries"). In this case, on the other hand, it has already been established that the Shipping Act, as applied to state instrumentalities, is constitutionally permissible. *California v. United States*, 320 U.S. at 585-586. We would submit that there has been no "plain showing" that the complaint provisions of the Shipping Act are any less validly applied to state-run ports than are the other sections of the statute. See *Morrison*, 529 U.S. at 607.

II. The Commission does not exercise the judicial power of the United States, and its adjudication of a complaint is not the functional equivalent of a lawsuit.

SCSPA argues (Br. 32-34) that the Commission exercises judicial power in its adjudication of a privately-filed complaint, such that the Eleventh Amendment and the Court's decisions interpreting that Amendment are literally applicable to this case. It also contends (Br. 34-39) that a Commission adjudication is the functional equivalent of a lawsuit, so the exercise of judicial power is beside the point. It errs on both counts.

1. The Commission does not exercise judicial power when it adjudicates complaints. As Justice Scalia has explained:

> It is no doubt true that all such [administrative] bodies "adjudicate," *i.e.*, they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing "inherently judicial" about "adjudication." To be a federal officer and to adjudicate are necessary but not sufficient conditions for the exercise of federal judicial power.

Freytag, 501 U.S. at 909 (Scalia, J., concurring in part and concurring in the judgment). The Commission's adjudication of a complaint under the Shipping Act does not involve an exercise of "[t]he Judicial power of the United States." U.S. Const. amend. XI. "Adjudication, in other words, is no more an inherently judicial function than the promulgation of rules governing primary conduct is an inherently legislative one." *Freytag*, 501 U.S. at 910 (Scalia, J., concurring in part and concurring in the judgment) (internal quotation marks omitted). Nor does the authority to adjudicate complaints transform the identity or nature of the officers charged with administering such adjudications. "[A]dministrative board[s of the United States] exercise the executive power, not the judicial power of the United States." *Id.* at 909. See FMC Br. 20-23. Thus, what SCSPA characterizes (Br. 33) as the "judicial nature" of the Commission's adjudication of a complaint does not convert that adjudication into an exercise of "the judicial authority in Article III," which is precisely the authority limited by the Eleventh Amendment. *Blatchford*, 501 U.S. at 779.

It should also be noted that the court of appeals in this case did not hold that the Commission exercises judicial power when it adjudicates complaints; rather, the court found the Commission's exercise of executive power to be "irrelevant" to the question presented, notwithstanding that the Eleventh Amendment forbids extensions of "[t]he Judicial power of the United States" to suits against unconsenting States. Pet. App. 11a. The court of appeals' opinion is based upon a conclusion that the States enjoy sovereign immunity not only from judicial power, but also,

and more broadly, from all "adversarial proceedings." *Ibid.* It is the Commission's contention that a constitutional immunity from "adversarial proceedings" is unsupportable. See *supra* at 5-7; FMC Br. 17-29.

2. The Commission's adjudication of a complaint is not, as SCSPA suggests (Br. 34-39), the functional equivalent of a lawsuit heard by a federal or state court. A Commission proceeding lacks the primary indicia of, and serves different purposes than, the judicial resolution of a "suit in law or equity." U.S. Const. amend. XI.

a. At the most basic level, the absence of Commission authority to enforce its orders illustrates a fundamental distinction between an agency proceeding and a suit in federal or state court. The Commission must rely on a district court to enforce its orders in the event they are violated. See 46 U.S.C. app. 1711(e) (civil penalties issued by the Commission may be enforced in federal district court by the Attorney General at the Commission's request); *id.* at 1713(c) (nonreparation orders and subpoenas may be enforced in federal district court by the Attorney General at the Commission's request, or by a party); *id.* at 1713(d) (a party to a Commission proceeding may enforce a reparation order in federal district court).[5] Because the Commission *may* request that the Attorney General enforce a Commission order, an enforcement proceeding in the name of the United States by necessity involves a political decision whether to proceed. This Court has explained that an action in court "which is commenced and prosecuted against a State

[5] The issue whether a Commission-issued reparations order is "enforceable" in district court is not before this Court. See 46 U.S.C. app. 1713(d) (enforcement of reparations orders). While the Commission believes that an enforcement proceeding under the Act would not transgress the States' sovereign immunity from suit, Pet. App. 35a-37a, that issue is not ripe because such a proceeding in this case has not been initiated. Indeed, the Commission has not yet decided whether SCSPA violated the Shipping Act, so any reparations order would be premature.

in the name of the United States by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed,' U.S. Const., Art. II, § 3, differs in kind from the suit of an individual." *Alden*, 527 U.S. at 755. Moreover, the Commission cannot itself punish contempt, and its orders are therefore not coercive in the relevant sense. See *International Union v. Bagwell*, 512 U.S. 821, 831 (1994). A Commission order in an adjudication, as a regulatory determination, is no more or less coercive than an agency rulemaking would be. See 46 U.S.C. app. 1716(a) ("The Commission may prescribe rules and regulations as necessary to carry out this Act"). Indeed, the actual functional equivalence in the Commission's administration of the Shipping Act is not between an adjudication and a lawsuit, but rather between an adjudication and a rulemaking. See *SEC v. Chenery Corp.*, 332 U.S. 194, 200-203 (1947).

b. The filing of a complaint under the Shipping Act is not contingent upon a request for monetary reparations. The statute provides that any person "may" file a complaint, and additionally "may," but need not, "seek reparation for any injury." 46 U.S.C. app. 1710(a). The Commission's regulations interpreting these statutory provisions require that a complaint include "a request for the relief *or other affirmative action* sought." 46 C.F.R. 502.62(a) (2001) (emphasis supplied). Accordingly, SCSPA's emphasis (Br. 11) on Maritime Services' request for monetary reparations in its complaint is beside the point. A complaint may permissibly be filed to secure non-monetary relief (*e.g.*, a cease and desist order), to ask the Commission to seek an injunction in the agency's own name in a federal district court, see 46 U.S.C. app. 1710(h)(1), or simply to request an affirmative agency determination that certain conduct is unlawful, with no further relief sought. For this reason, the Commission has interpreted the statute of limitations in the Act, *id.* at 1710(g), to apply only to requests for monetary reparations. *Rascator Maritime S.A. v. Cargill*, 25 F.M.C. 470 (1982)

(finding that the statute of limitations in the Shipping Act of 1916 "applies only to requests for reparations"); see also 46 C.F.R. 502.63 (2001) ("statute of limitations for reparations").

In this case, Maritime Services filed its complaint in part as a means of bringing SCSPA's alleged Shipping Act violations to the Commission's attention, contemplating that the agency itself would seek injunctive relief in federal district court against SCSPA; Maritime Services also sought monetary reparations and an agency-issued cease and desist order. See JA 15 (complaint of Maritime Services) ("Maritime Services hereby respectfully requests that the Commission file suit against [SCSPA] in the United States District Court for the District of South Carolina, Charleston Division, and seek a temporary restraining order and preliminary injunction"); see also JA 51 (Maritime Services' response to SCSPA's motion to dismiss) (arguing that "the Commission is empowered to bring suit in Federal District Court against" SCSPA). SCSPA concedes (Br. 5) that this was one of the objectives of Maritime Services' complaint. Such an injunctive proceeding, under 46 U.S.C. app. 1710(h)(1), would be in the name of the Commission and would not trespass upon a state-run port's Eleventh Amendment immunity from suit in federal district court.[6] See, *e.g.*, *United States v. Texas*, 143 U.S. 621 (1892). SCSPA has not addressed the fact that Maritime Services' complaint constitutes in part a request for unquestionably permissible agency action in the agency's own name.

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[6] The Shipping Act provides that the Commission may seek injunctive relief "[i]n connection with any investigation." 46 U.S.C. app. 1710(h)(1); see *id.* at 1705(k) (suit would be in the Commission's name). The section of the Act that authorizes the Commission to seek an injunction refers to the Commission's adjudication of a privately-filed complaint as an "investigation." See, *e.g.*, 46 U.S.C. app. 1710(b) ("the Commission shall investigate [a complaint] in an appropriate manner and make an appropriate order"); see also *id.* at 1710(d) ("Conduct of investigation"); *id.* at 1710(f) ("The Commission shall make a written report of every investigation made under this Act in which a hearing was held").

c. SCSPA incorrectly contends (Br. 12-13) that an administrative agency adjudication "serves the same purpose as an Article III court." Agency adjudication exists to vindicate the public interest in the regulation of a particular industry. *Thomas v. Union Carbide*, 473 U.S. 568, 589 (1985). Adjudication also permits agencies to develop policy on a case-by-case basis in the course of vindicating that public interest. *Chenery Corp.*, 332 U.S. at 203. Judicial resolution of a "Case" or "Controversy," U.S. Const., Art. III, sec. 2, on the other hand, is intended "'to decide on the rights of individuals.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Marbury v. Madison*, 1 Cranch 137, 170 (1803) (Marshall, C.J.)); see also *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998) ("Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.' We have always taken this to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process"). The purposes of administrative adjudication thus differ from those of a lawsuit. The extent to which they may be similar in form or result (*i.e.*, a complaint for monetary reparations) does not, on the whole, transform the agency's enforcement of the Shipping Act into a "functional" lawsuit. Indeed, in its order in this case, the Commission explained that whether "a complainant is able to collect on a reparations award is a separate issue, distinct from the Commission's obligation to pass judgment on the legality of allegedly unreasonable or otherwise prohibited actions." Pet. App. 37a.

III. The use of administrative adjudications to vindicate public rights does not undermine the States' immunity from suit.

The adjudication of complaints by an administrative agency such as the Commission that does not exercise judicial power has its analytical foundation in the public rights doctrine. The doctrine is based upon a "historically

recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently * * * judicial.'" *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). Matters that are not inherently judicial need not be heard by a court; in our opening brief we suggest (Br. 34-41) that SCSPA's sovereign immunity from suit would not apply in the administrative adjudication of such matters.

SCSPA responds to this argument by asserting (Br. 14) that to uphold the Shipping Act's complaint procedures as applied to state-run ports would permit the administrative adjudication of "the very private party suits this Court has decried as running afoul of the States' sovereign immunity." To the contrary, the public rights doctrine holds that "private party disputes" – understood as disputes founded on purely private rights – must be heard by courts, in which fora SCSPA's immunity would apply. See, *e.g.*, *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 284 (1855) (Congress cannot "remove from judicial cognizance" matters that are by nature "the subject of a suit at the common law, or in equity, or admiralty"). In the adjudication of matters involving public rights, which this case is, see FMC Br. 35-38, on the other hand, Congress has the authority to require non-Article III tribunals to administer adjudications. However, because Congress' authority to vest agencies with the power to adjudicate public rights is limited, there is no danger that the Commission's adjudication of the complaint filed against SCSPA in this case will create a "beltway around the Constitution." SCSPA Br. 14.

The limits imposed on Article III courts by the Eleventh Amendment, and the limits imposed on the resolution of matters through administrative adjudication by the public rights doctrine, are complementary. Congress may not "circumvent the constitutional limitations placed upon federal jurisdiction," *Seminole Tribe*, 517 U.S. at 73, by abrogating

the States' Eleventh Amendment immunity from suit in federal court, and Congress also may not "'transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (quoting *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)). The "limitations placed upon federal jurisdiction" are therefore both exclusive and inclusive, as they stipulate what cannot be heard by federal courts, such as suits by private persons against unconsenting States, and what must be heard by federal courts, such as "statutory right[s] * * * not closely intertwined with a federal regulatory program." *Granfinanciera v. Nordberg*, 492 U.S. 33, 54 (1989). See also *Freytag*, 501 U.S. at 910-911 (Scalia, J., concurring in part and concurring in the judgment) (noting the limitations on Congress' authority to place the adjudication of disputes in administrative agencies). In conferring on the Commission the authority to adjudicate matters involving public rights, Congress has not improperly abrogated the States' immunity from suit in an Article III court. At the same time, because Shipping Act rights are public rights, see FMC Br. 35-38, Congress has not improperly removed the matters adjudicated by the Commission from the cognizance of the Article III courts.[7] Moreover, the Commission's limited authority to adjudicate complaints is not inconsistent with *Alden*, in which the Court explained that "an *unlimited* congressional power to authorize suits in state court" would "giv[e] Congress a power and a leverage over the States that is not contemplated by our constitutional design." 527 U.S. at 750 (emphasis supplied); see also *id.*

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[7] This case does not present the question whether in Article I courts, which exercise judicial power, a sovereign immunity defense could be maintained. See, *e.g.*, *Freytag*, 501 U.S. at 889-890 (holding that the Tax Court, an Article I body, exercises judicial power); US Br. 21 ("We may assume, arguendo, that state sovereign immunity principles would apply to proceedings before a body formally located within the Executive Branch but possessing the attributes * * * traditionally associated with courts").

(noting the difficulties that would ensue if there were "[a] general federal power to authorize private suits for money damages" in state court). We suggest that matters from which the Eleventh Amendment guarantees the States an immunity are among those which the public rights doctrine assures will be heard in judicial proceedings – heard, of course, only when a State is not an unconsenting defendant.

IV. The issue whether the United States is immune from adjudicatory proceedings conducted by its own administrative agencies is not before this Court.

SCSPA claims (Br. 24-31) that the United States itself maintains a form of sovereign immunity from federal administrative adjudications, and that the States should be entitled to a reciprocal immunity. Although the scope of the United States' immunity is entirely outside of the question presented by this case, we would note that the Court has already found that the United States is a "person" subject to the Shipping Act's provisions, *Far East Conf. v. United States*, 342 U.S. 570 (1952), and that at least one federal court of appeals has declined to accept the United States' argument, under a different statute, that it is entitled to sovereign immunity from proceedings before "executive branch adjudicatory bodies." *Tennessee Dept. of Human Serv. v. U.S. Dept. of Education*, 979 F.2d 1162, 1166 (6th Cir. 1992). This Court has not yet ruled on the application of sovereign immunity principles to an administrative adjudication against the United States.

SCSPA errs in relying (Br. 27-28) on *West v. Gibson*, 527 U.S. 212 (1999), to support its contention that an administrative adjudication implicates the Federal Government's sovereign immunity. The Court in *West* held that Title VII of the Civil Rights Act of 1964 authorized the EEOC to award compensatory damages against federal agencies in employment discrimination cases. 527 U.S. at 217. The Court also addressed the argument that a waiver of

the Federal Government's immunity was necessary in order for the EEOC to have the authority to award such damages; the Court noted that the statute waived any immunity that *might* exist. *Id.* at 222. The Court did not, however, rule on the more fundamental question whether there is such an immunity, finding instead that if the United States could be immune from administrative adjudications, its immunity had been waived by statutory design. *Ibid.* Accordingly, the Court characterized the issue as a "question concerning how the waived damages remedy is to be administered," not as an issue of the applicability of sovereign immunity principles in the first place. *Ibid.* The Court noted that "ordinary sovereign immunity presumptions may not apply" to the administrative setting, but concluded that this was a question "which * * * we need not decide." *Ibid.* Similarly, the dissent in *West* distinguished "administrative 'proceedings'" from "judicial actions," and focused on whether the waiver in question was adequate. *Id.* at 227 (Kennedy, J., dissenting).

SCSPA's amici similarly err in relying on this Court's opinion in *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512 (1984). Br. of Nat'l Gov. Ass'n *et al.* 16-17. In *Franchise Tax Board*, the Court held that Congress' waiver of the Postal Service's immunity from suit was to be broadly construed, and applied that waiver to a proceeding before a state administrative tribunal. *Id.* at 516-525. The Court relied on precedent holding that a waiver of the immunity of a government corporation should be construed very broadly. *Id.* at 517-519 (relying on *FHA v. Burr*, 309 U.S. 242 (1940)). The Court looked to Congress' "intent to waive immunity," *id.* at 521, and concluded that the intended waiver was sufficiently broad to encompass administrative proceedings. The Court did not, however, rule on the issue whether sovereign immunity principles apply in the administrative setting, but instead addressed "any sovereign immunity that the [Postal] Service *might* possess." *Id.* at 515 (emphasis supplied). It was not necessary for the Court to rule on the issue whether sovereign immunity

principles apply in administrative adjudications, because if such principles did apply, then they would have been waived; and if they did not apply, then no waiver was required.

Finally, the Office of Legal Counsel memorandum cited by SCSPA (Br. 28 and App. 4a-21a) is inapposite to this case. The memorandum was directed to the question whether the United States is a "person" under the Immigration Reform and Control Act. See SCSPA Br. App. 7a ("[t]he applicability of IRCA to federal agencies turns on whether federal agencies are 'person[s] or other entit[ies]' within the meaning of the Antidiscrimination Provision"). This Court has already held that state instrumentalities are persons, *California v. United States*, 320 U.S. at 585-586, and that the United States is a person, *Far East Conference*, 342 U.S. 570, under the Shipping Act. The reasoning supplied in the OLC memo is therefore of no analogous persuasive value, and does not support SCSPA's claim (Br. 30) that "all three branches of the federal government agree" on the application of sovereign immunity principles to agency adjudications.

V. Immunity from Shipping Act adjudications would be inconsistent with the requirement of national uniformity in the regulation of maritime commerce.

This Court recently explained that "the federal interest [in the regulation of maritime commerce] has been manifest since the beginning of our Republic," and that effective federal power over such commerce "was cited in the Federalist Papers as one of the reasons for adopting the Constitution." *United States v. Locke*, 529 U.S. 89, 99 (2000). The Court in *Locke* addressed the importance of federal maritime regulation in the context of federal preemption of state activity through administrative rulemaking. *Id.* at 115-116. In our opening brief, we argue (Br. 29-33) that sovereign immunity from Shipping Act adjudications for state-run ports would be inconsistent with the requirement of "a uniformity of regulation for maritime commerce." *Locke*, 529

U.S. at 108. SCSPA offers no response to this point, except to rely by analogy (Br. 47-48) on opinions addressing suits in admiralty, and on the holding in *Seminole Tribe* that "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." 517 U.S. at 72. As explained above (*supra* at 1-3), *Seminole Tribe* considered the scope of Congress' authority to abrogate the States' immunity from suit in federal district court, and did not address administrative regulation accomplished through adjudication. Citation to *Seminole Tribe* is no answer to the Commission's suggestion that the Founders would have held a State's assertion of sovereign immunity from federal Executive Branch authority over maritime commerce inconsistent with the constitutional design.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted.

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FEDERAL MARITIME COMMISSION, PETITIONER

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

		Page
I.	A State's sovereign immunity from private "suits" applies only in judicial proceedings and does not extend to the administrative adjudication at issue	2
II.	State entities have long been subject to similar administrative enforcement proceedings	12
III.	The FMC's jurisdiction over Maritime Services' complaint is consistent with the principles governing the sovereign immunity of the United States	15
IV.	Respondent has no basis for claiming immunity from the non-monetary relief sought in the administrative complaint	18

TABLE OF AUTHORITIES

Cases:

Alden v. *Maine*, 527 U.S. 706 (1999) 2, 3, 6, 9, 13, 17, 18
Ayers, In re, 123 U.S. 443 (1887) 17
California Canneries Co. v. *Southern Pac. Co.*, 51 I.C.C. 500 (1918) 14
California v. *Taylor*, 353 U.S. 553 (1957) 14
California v. *United States*, 320 U.S. 577 (1944) 13
Crowell v. *Benson*, 285 U.S. 22 (1932) 7
Dunlop v. *Bachowski*, 421 U.S. 560 (1975) 5
Franchise Tax Bd. v. *United States Postal Serv.*, 467 U.S. 512 (1984) 11, 12
Freytag v. *Commissioner*, 501 U.S. 868 (1991) 10, 11, 12
Hans v. *Louisiana*, 134 U.S. 1 (1890) 11
Heckler v. *Chaney*, 470 U.S. 821 (1985) 4, 5
Hensel v. *Office of Chief Admin. Hearing Officer*, 38 F.3d 505 (10th Cir. 1994) 15

Cases—Continued: Page

Pennhurst State Sch. & Hosp. v. *Halderman*, 465 U.S. 89 (1984) 11
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 20
Reno v. *Condon*, 528 U.S. 141 (2000) 18
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 8
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 3, 11, 20
United States v. *California*, 297 U.S. 175 (1936) 14
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979) 18
Upshur County v. *Rich*, 135 U.S. 467 (1890) 4
West v. *Gibson*, 527 U.S. 212 (1999) 16, 17
Young, Ex parte, 209 U.S. 123 (1908) 19

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 9, Cl. 7 (Appropriations Clause) 18
Art. II, § 2 (Appointments Clause) 10, 11
Art. III 3, 5, 10, 11
Art. IV, § 3, Cl. 2 (Property Clause) 18
Art. VI, § 2 (Supremacy Clause) 17
Amend. XI 1, 10, 11, 18, 20
Amend. XIV, § 5 17
Act of Sept. 2, 1789, ch. 12, § 5, 1 Stat. 66-67 13
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 16
Immigration Reform and Control Act of 1986, 8 U.S.C. 1324b(a)(1) 15
Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 13-14
§§ 13-15, 24 Stat. 383-384 14
Shipping Act of 1916, ch. 451, §§ 22-23, 39 Stat. 736 13

Statutes and regulations—Continued: Page

Shipping Act of 1984, 46 U.S.C. app. 1701 *et seq.*:
46 U.S.C. app. 1710 13
46 U.S.C. app. 1710(h) 19
46 U.S.C. app. 1710(h)(2) 19
46 U.S.C. app. 1713(c) 6
46 U.S.C. app. 1713(d) 6
5 U.S.C. 553 7
5 U.S.C. 554(d) 4
39 U.S.C. 401(1) 11
46 C.F.R.:
Section 502.51(a) 7
Section 502.72 8
Section 502.76 8

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G. Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211 (1989) 13
F. Easterbrook, *"Success" and the Judicial Power*, 65 Ind. L.J. 277 (1990) 5
R. Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 Harv. L. Rev. 915 (1988) 12

In the Supreme Court of the United States

No. 01-46

FEDERAL MARITIME COMMISSION, PETITIONER

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent asks this Court, for the first time, to extend the States' Eleventh Amendment and sovereign immunity into federal administrative proceedings. However, both the Eleventh Amendment and broader sovereign immunity principles traditionally have been understood to provide only an immunity from the invocation of the judicial power by private citizens in suits against the States. States enjoy no special immunity from the authority of the federal Executive Branch to investigate and prosecute violations of federal law. Indeed, the State has no immunity even when the federal government sues a State in court at the behest and for the benefit of private individuals.

The Federal Maritime Commission (FMC), like many other administrative agencies, enforces the law through self-initiated enforcement actions, rule-makings, and privately-initiated complaints. Respondent concedes, as it must, that it has no immunity when the FMC enforces the law through either of the first two mechanisms. Respondent's claim to

immunity when the agency exercises the last of those options rests on the mistaken premise that administrative adjudication of private complaints is actually an exercise of federal judicial power. Although agency adjudication bears some resemblance to traditional judicial proceedings, it remains an Executive Branch function designed to ensure that the laws are faithfully executed. Principles of sovereign immunity limit the means by which administrative orders may be enforced in court, but they have no effect on the administrative proceeding itself.

I. A STATE'S SOVEREIGN IMMUNITY FROM PRIVATE "SUITS" APPLIES ONLY IN JUDICIAL PROCEEDINGS AND DOES NOT EXTEND TO THE ADMINISTRATIVE ADJUDICATION AT ISSUE

A. Respondent's claim to an immunity from federal administrative adjudication ignores the fact that States remain subject both to the substantive commands of valid federal statutes and to the enforcement authority of Executive Branch officials within the federal government. As this Court recognized in *Alden* v. *Maine*, 527 U.S. 706, 754-755 (1999), "[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law."

Respondent acknowledges that it is subject both to the substantive provisions of the Shipping Act of 1984 (Shipping Act) and to enforcement efforts undertaken by the FMC on its own initiative. See Resp. Br. 4. The FMC's power to administer the Act necessarily encompasses the authority to investigate possible violations in order to determine whether enforcement efforts are warranted in particular instances. As in other enforcement contexts, such investigations will often be triggered by private complaints. To determine whether a particular complaint has merit and whether the federal government should take any action in its own name,

Executive Branch officials will often hear from both the complainant and the alleged violator; those officials will then attempt to resolve any pertinent factual disputes and to interpret the relevant law. That process may in many respects resemble a court's resolution of private litigation, but the resemblance neither transforms the Executive Branch proceedings into a "suit" nor triggers the State's sovereign immunity. In attempting to "strike[] the proper balance between the supremacy of federal law and the separate sovereignty of the States," *Alden*, 527 U.S. at 757, this Court has accorded the States a broad immunity from private suits but has simultaneously emphasized the need for effective alternative mechanisms to ensure state compliance with valid federal law. See *id.* at 755-757; U.S. Br. 16-17. Respondent's proposed constitutional rule would subvert that balance by injecting sovereign immunity principles into the investigative and enforcement efforts of the Executive Branch.[1]

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[1] In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the Court concluded that

> [e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and *Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.*

Id. at 72-73 (emphasis added; footnote omitted). Respondent relies on the italicized language, apparently reading it to mean that no federal officer may be authorized to adjudicate a claim against an unconsenting State. See Resp. Br. 12, 14, 21. The passage as a whole, however—and, in particular, the statement that "[t]he Eleventh Amendment restricts the judicial power under Article III" (a clause that respondent omits from its own block quotation, see Br. 21)—*contrasts* Congress's limited power to confer jurisdiction on the federal *courts* with its otherwise plenary authority over particular subject matters. If under the "public rights" doctrine (see U.S. Br. 17-18) a particular determination is appropriately entrusted to a non-Article III adjudicator, nothing in *Seminole Tribe* suggests that an additional limitation on congressional power applies simply because a State is involved in the dispute.

Like the court of appeals (see Pet. App. 15a-16a), respondent emphasizes that the FMC in adjudicating private complaints employs procedural rules very similar to those that govern civil litigation. See Resp. Br. 34-36. But if the FMC's investigation of a private complaint and its issuance of a reparation or nonreparation order at the conclusion of its investigation are otherwise appropriate exercises of executive power, the agency's use of a structured and formalized decisionmaking process cannot render those actions illegitimate. Cf. *Upshur County* v. *Rich*, 135 U.S. 467, 472 (1890) ("The fact that the board of appeal may swear witnesses does not make the proceeding a suit" because "[a]ssessors are often empowered to do this without altering the [administrative] character of their functions.").[2]

Any constitutional rule under which the relative formality of agency procedure triggers a State's sovereign immunity from private "suits" would likely prove unworkable in practice.[3] Such a rule would also create perverse incentives for

[2] Some of the formalities and procedural rules that respondent and its amici identify simply underscore that, despite some superficial similarities to court actions, FMC adjudicative proceedings remain vehicles for executive enforcement of the Shipping Act. For example, the requirement that ALJs maintain their independence from the FMC's prosecuting functions, 5 U.S.C. 554(d), underscores that the FMC remains an interested party in the adjudication. That fact is made crystal clear by the FMC's ability to review an ALJ decision sua sponte, even if the parties to the proceeding do not wish to appeal (as was the case here, see Pet. App. 29a). Indeed, the fact that the original complaining party has played no role in the judicial proceedings in this case and that its interests are being served by the FMC demonstrates that the proceedings before the FMC are administrative, not judicial.

[3] Contrary to respondent's suggestion (Br. 36-37), the FMC's obligation to resolve the merits of every private complaint does not transform the adjudicative proceeding into a private "suit." "[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985); see *id.* at 831-832. Congress may, however, limit an agency's prosecutorial discretion by requiring it to decide the merits of particular private complaints and to take enforcement

Executive Branch decisionmakers to eschew procedures that have been found in other settings to be conducive to the accurate resolution of legal and factual disputes. Cf. U.S. Br. 32 n.12 (Professor Bator explains that "it is only a step—and one quite consistent with the ideal of 'faithful' execution of the laws—from informal, implicit adjudication to the notion that in making these determinations the official should hear the parties, make a record of the evidence, and give explicit formulations to his interpretation of the law"); F. Easterbrook, *"Success" and the Judicial Power*, 65 Ind. L.J. 277, 280 (1990) ("From the beginning, the Executive Branch has employed procedures we think of as 'judicial,' precisely because they are useful in finding facts.").[4]

B. Respondent contends that an FMC administrative adjudication is the practical equivalent of a private lawsuit because "[t]he Commission's adjudication of the private plaintiff's claim in this case would not differ in its effect upon the State from an Article III tribunal's adjudication of the same claim." Resp. Br. 12. That is incorrect. A suit brought in an Article III court culminates in a *judgment* that is enforceable by the court that entered it through the power of contempt. By contrast, any reparation or nonreparation order that might be entered by the FMC at the close of the agency adjudication at issue here (or any interim order to cease ongoing violations) could be enforced only through a subsequent judicial action. See U.S. Br. 18-20. If that judicial

action if it finds a complaint to be meritorious. See *id.* at 833-835; *Dunlop* v. *Bachowski*, 421 U.S. 560, 562-563 & n.2, 567 n.7 (1975). Such statutory constraints do not transform the agency's ultimate determination that a violation has occurred into something other than an executive act.

[4] As Judge Easterbrook further explained, "Thomas Jefferson, who as Secretary of State was charged with the duty of awarding patents to useful inventions, may have entertained argument from applicants (and rivals opposed to monopoly) about what they had accomplished, without creating any greater danger that he was exercising judicial power than would the President's decision to entertain argument and receive evidence before deciding whether to issue a pardon." 65 Ind. L.J. at 280.

action is initiated by a private complainant, respondent may then invoke its constitutional immunity from private "suits"; if it is brought by the federal government, its prosecution will "require the exercise of political responsibility" by federal officials that has been found in other contexts to provide adequate protection for the State's sovereign prerogatives. *Alden*, 527 U.S. at 756. In either event, application of immunity principles to any judicial proceedings brought to enforce the FMC's orders will prevent the practical harm to the State's autonomy and fiscal integrity that unrestricted private suits potentially entail.[5]

Respondent also contends that any FMC order would effectively bind state officials because those officials are obligated to obey federal law. See Resp. Br. 39. But that argument once again rests on the mistaken premise that an FMC order is an enforceable judicial order, rather than a statement of Executive Branch position. Respondent's obligation to obey the Shipping Act does not entail a duty to

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[5] The Shipping Act authorizes the Attorney General to bring an action in federal district court to enforce a nonreparation order, but the Act does not authorize any federal official to sue to enforce a reparation order. Compare 46 U.S.C. app. 1713(c), with 46 U.S.C. app. 1713(d); see U.S. Br. 5-6. Respondent's sovereign immunity from private suits would therefore effectively preclude judicial enforcement, over respondent's objection, of any FMC order directing the payment of money. Of course, even a reparations complaint could lead the federal government to seek injunctive relief that would redound to the benefit of the private party. In contrast to the Shipping Act, the whistleblower provisions of various environmental statutes uniformly authorize the Secretary of Labor and/or the United States to file suit to enforce any order issued at the conclusion of the administrative process, including one for monetary relief. See U.S. Br. 6 n.2. Because the States have consented to suit by the United States, even where the relief sought is the payment of money to the individual victim of a State's violation, see *Alden*, 527 U.S. at 755-756, 759-760, those whistleblower provisions are valid. But the absence in the Shipping Act of any comparable provision authorizing federal government suits to enforce the FMC's reparation orders further reduces the supposed coercive effect of the agency proceedings.

acquiesce in any FMC pronouncement that a Shipping Act violation has occurred. See U.S. Br. 30-31.

C. Amici National Governors Association, et al., contend (Br. 23-25) that a state entity in respondent's position would be subject to substantial monetary penalties if it failed to comply with an FMC reparation order and would therefore "have no practical choice but to pay the reparations award" (Br. 25). Amici identify no instance, however, in which the FMC has assessed civil penalties (against either a state or private entity) for failure to pay a reparation award. In light of the overall structure of the Shipping Act, under which neither the FMC nor the Attorney General is authorized to seek judicial enforcement of a reparation order (see note 5, *supra*), the FMC's statutory authority to impose civil penalties for violations of such orders is doubtful. Moreover, the constitutional questions raised by that interpretation would provide an additional basis for construing the statute not to confer such authority on the FMC. See, *e.g.*, *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). If the FMC ever attempts to subject a state entity to civil penalties for failure to pay a reparations award, any constitutional questions posed by such a proceeding can be addressed at that time. See U.S. Br. 29-30 n.11.

Respondent and its amici also complain that the initiation of an FMC complaint proceeding creates practical pressure to participate in the adjudication and to comply with any FMC order. However, even outside the context of administrative complaints against state entities, submissions by private parties may initiate agency processes in which a State has a substantial practical incentive to participate. A private party might, for example, petition the agency to promulgate a regulation (see 5 U.S.C. 553; 46 C.F.R. 502.51(a)) that would significantly affect a State's interests, including fiscal interests. The resulting incentive for the State to submit comments during the course of any rulemaking would not raise any immunity concern, however, because a rule-

making is not a "suit." Similarly, FMC regulations governing complaint proceedings authorize intervention or amicus participation by persons whose interests may be affected by the FMC's disposition of the complaint. See 46 C.F.R. 502.72, 502.76. State entities may sometimes feel a strong practical incentive to participate as intervenors or amici in complaint proceedings involving private parties, since "Commission decisions in complaint cases * * * serve as precedent in future complaint cases and investigations." Pet. App. 37a. But that potential impact on a State's interests is an obviously insufficient basis for concluding that such complaint proceedings infringe the State's sovereign immunity.

Adjudication of private complaints serves not only to resolve disputes between discrete regulated entities, but also as a vehicle for the FMC to clarify its interpretation of the Shipping Act. See U.S. Br. 23-24. Respondent acknowledges that it has no immunity when the FMC interprets the Shipping Act through rulemaking or agency-initiated enforcement actions. Respondent likewise should have no immunity in the context of private complaints because the FMC's role remains the quintessentially executive function of law enforcement. "[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). The FMC should enjoy broad latitude to determine that particular interpretive and policy questions are better resolved within the framework of a concrete dispute than in the more abstract setting of an agency rulemaking. A constitutional rule that precluded the FMC from adjudicating a private complaint against an unconsenting state entity would unnecessarily hinder the agency's efforts to implement the Shipping Act in the manner that it believes will best serve the public interest.

D. Respondent repeatedly suggests that this Court's decision in *Alden* requires a finding of immunity here. But this Court's holding that state sovereign immunity principles apply to all judicial proceedings, state or federal, does not support respondent's claim of immunity from federal administrative proceedings. *Alden* held that constitutional principles of sovereign immunity preclude Congress from subjecting unconsenting States to suit in their own courts. In rejecting the contention that "immunity from suit in federal court suffices to preserve the dignity of the States," the Court explained that "[p]rivate suits against nonconsenting States * * * present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties, *regardless of the forum*." 527 U.S. at 749 (emphasis added; citations and internal quotation marks omitted).

Respondent repeatedly invokes the italicized language (see Br. 10, 22, 32, 40, 48), but the context in which the phrase appears makes clear that respondent's reliance is misplaced. Although the Court in *Alden* held that States possess a broad immunity from private "suits" in any judicial forum, whether federal or state, it did not purport to extend the immunity to non-judicial settings. To the contrary, the Court's unqualified assertion that "[p]rivate suits" subject the defendant "to the coercive process of judicial tribunals," 527 U.S. at 749, reflects an apparent understanding that "suits" are by their nature prosecuted before *judicial* bodies. That understanding is consistent both with traditional usage (see U.S. Br. 15-16) and with the purpose of sovereign immunity, which protects against the "coercive process of judicial tribunals" and safeguards the public fisc. The Court's recognition that the States retain immunity from suit "regardless of the forum" thus has no relevance to the administrative proceeding at issue here, which is conducted before a non-judicial body and therefore is not a "suit."

The *Alden* Court's repeated references to the potentially disruptive effects of private "suits" before "judicial" tribunals is consistent with the text of the Eleventh Amendment, which is in terms a limit on "[t]he Judicial power" to entertain "suit[s] in law or equity" against a State. Respondent correctly observes that the States' sovereign immunity has been held to extend beyond the literal terms of the Eleventh Amendment. Resp. Br. 15, 32; see U.S. Br. 15, 27. *Alden*, for example, recognized an immunity in state courts, even though the Eleventh Amendment addresses only federal courts. It does not follow (as respondent appears to believe, see Br. 32), however, that the text of the Amendment is irrelevant, or that its invocation is an illegitimate form of argument. To the contrary, the text of the Eleventh Amendment reflects a specific application of a broader immunity principle. And as the Amendment's text makes clear, the broader principle is one of immunity from "suit" in the courts, not an immunity from all process, and especially not an immunity from the law enforcement power of the federal government.

E. Relying principally on *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), respondent attempts to bring its claimed immunity closer to the terms of the Eleventh Amendment and the spirit of sovereign immunity, arguing that "[w]hen adjudicating a private complaint, federal administrative agencies exercise the judicial power of the United States." Resp. Br. 32; see *id.* at 13, 32-34. Respondent's reliance on *Freytag* is misplaced.

Freytag might well be relevant if this case involved a suit by a private party against a State in the Tax Court (of course, no such suit lies within the Tax Court's jurisdiction). *Freytag* held only that the Tax Court, although not an Article III court, is a "Court[] of Law" for purposes of the Appointments Clause, Article II, Section 2. See 501 U.S. at 888-892. The Court in *Freytag* took pains to limit its discussion to the Tax Court, which, unlike entities such as the

FMC, "exercises judicial power to the exclusion of any other function" and "has authority to punish contempts." *Id.* at 891. The Court noted that the "Tax Court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions." *Id.* at 892.

Indeed, the only Justices to address the constitutional status of ALJs in entities like the FMC concluded that such officers wield executive rather than judicial power. See 501 U.S. at 908-914 (Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., concurring in part and concurring in the judgment). Those Justices observed that administrative law judges who conduct adjudications under the Administrative Procedure Act "are all *executive* officers." *Id.* at 910. They explained that "there is nothing 'inherently judicial' about 'adjudication.' To be a federal officer and to adjudicate are necessary but not sufficient conditions for the exercise of federal judicial power." *Id.* at 909. In any event, whatever the scope of the Appointments Clause's reference to "Courts of Law," the history and purpose of the Eleventh Amendment and this Court's precedents make quite clear that the Amendment's reference to "judicial power" refers to the judicial power of Article III courts. See *Hans* v. *Louisiana*, 134 U.S. 1, 11 (1890); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 64 (1996) (describing as "well established" that "the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction *under Article III*") (emphasis added); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 97-98 (1984).[6]

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[6] The reliance of amici National Governors Association, et al. (see Br. 3, 16-17) on *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512 (1984), is also misplaced. The Court in *Franchise Tax Board* held that the "sue-and-be-sued" clause contained in 39 U.S.C. 401(1) waived the Postal Service's immunity from garnishment orders issued by a state administrative body. See 467 U.S. at 516-525. The Court did not suggest, however, that an administrative enforcement proceeding is *typically*—or has been *historically*—regarded as a "suit." Rather, consistent with its usual practice when addressing issues of federal sovereign immunity, the

II. STATE ENTITIES HAVE LONG BEEN SUBJECT TO SIMILAR ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

Respondent contends (Br. 18-19) that for the bulk of our country's history, States and state agencies were understood to be immune from administrative enforcement proceedings of the sort at issue here. Respondent suggests (Br. 19) that statutes authorizing such proceedings have been enacted only "in the last generation." That claim is mistaken.

A. Although the prevalence of administrative adjudication has increased dramatically over the nation's history, the principle that legal and factual disputes may be resolved by executive officers is as old as the Constitution. "The first Patent Board, which consisted of Thomas Jefferson, Henry Knox, and Edmund Randolph in their capacities as Secretary of State, Secretary of War, and Attorney General, respectively, adjudicated the patentability of inventions, sometimes hearing argument by petitioners." *Freytag*, 501 U.S. at 910 (citation omitted) (Scalia, J., concurring in part and concurring in the judgment); see note 4, *supra*; R. Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 Harv. L. Rev. 915, 919 (1988).[7] The Framers authorized

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Court focused on the statute before it and explained that "Congress intended the Postal Service to be treated similarly to other self-sustaining commercial ventures." *Id.* at 525. In order to effectuate that intent, the Court "liberally construe[d] the sue-and-be-sued clause" to ensure "that the Service's liability is the same as that of any other business." *Id.* at 520.

[7] Professor Fallon explains that

> [i]n its first session, the first Congress—whose decisions often are viewed as a repository of insight into the historical intent underlying article III—vested responsibilities in executive officers of the Treasury Department that might instead have been assigned to constitutional courts. Among the disputes committed to nonjudicial resolution were claims to veterans' benefits and controversies surrounding customs duties.

101 Harv. L. Rev. at 919 (footnotes omitted).

Executive Branch officials to perform such functions notwithstanding their recognition that administrative adjudication bears a functional resemblance to judicial action. Thus, in debate on the bill establishing the Treasury Department, James Madison observed that under the bill the responsibilities of the Comptroller would "partake of a judiciary quality as well as executive" because the Comptroller's "principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and the particular citizens." G. Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 238 (1989). The law as enacted preserved the Comptroller's adjudicative function. See Act of Sept. 2, 1789, ch. 12, § 5, 1 Stat. 66-67. Respondent cites no instance in which any member of the Founding generation sought or received an assurance that Executive Branch officers would not adjudicate disputes involving unconsenting States. Compare *Alden*, 527 U.S. at 715-727.

B. The Shipping Act itself was enacted in 1916. The Act in its original form was authoritatively held by this Court to apply to state terminal facilities. *California* v. *United States*, 320 U.S. 577, 585-586 (1944); see U.S. Br. 2-3. The 1916 Act contained provisions, not meaningfully different from those in the current law, authorizing the submission of private complaints for resolution by the United States Shipping Board. Compare Act of Sept. 7, 1916, ch. 451, §§ 22-23, 39 Stat. 736, with 46 U.S.C. app. 1710. Thus, the very statutory scheme at issue in this case has *for nearly a century* authorized the FMC and its predecessor to resolve private complaints against state entities. See also Brief of Amici United States Maritime Alliance Limited, et al., at 17 n.6 (collecting reported cases involving private complaints against state entities).

C. The Shipping Act of 1916 was based upon an even earlier model, the Interstate Commerce Act (ICA), Act of

Feb. 4, 1887, ch. 104, 24 Stat. 379, which was enacted three years before this Court's decision in *Hans* v. *Louisiana*. The ICA authorized the Interstate Commerce Commission (ICC) to adjudicate private complaints alleging violations of the Act by any "common carrier." §§ 13-15, 24 Stat. 383-384. In *California* v. *Taylor*, 353 U.S. 553 (1957), this Court noted with apparent approval that the ICC "has treated * * * state-owned interstate rail carriers as subject to its jurisdiction" under the ICA. *Id.* at 561-562. The Court invoked that enforcement history in support of its conclusion that state-owned railroads are covered by the Railway Labor Act, which "defines generally the carriers to which it applies as 'any carrier by railroad, subject to the Interstate Commerce Act.'" *Id.* at 561 (Court's emphasis omitted); see *id.* at 561-568; see also *United States* v. *California*, 297 U.S. 175, 185-186 (1936) (invoking the same ICC enforcement history as support for the Court's conclusion that the Safety Appliance Act, which likewise uses the term "common carrier," applies to state-owned railroads). Among the ICC decisions cited by the *Taylor* Court (see 353 U.S. at 562) was *California Canneries Co.* v. *Southern Pacific Co.*, 51 I.C.C. 500 (1918), which involved the ICC's adjudication of a private complaint against a state-owned carrier. See *id.* at 503 (in determining whether a belt line is a "common carrier" covered by the ICA, "[t]he fact that the belt line is owned and operated directly by the state is of no importance"). The ICC's enforcement practice, and this Court's reliance on it, further refute respondent's suggestion of a longstanding consensus that principles of sovereign immunity bar Executive Branch adjudication of private complaints against unconsenting state entities.

III. THE FMC'S JURISDICTION OVER MARITIME SERVICES' COMPLAINT IS CONSISTENT WITH THE PRINCIPLES GOVERNING THE SOVEREIGN IMMUNITY OF THE UNITED STATES

Respondent contends (Br. 24-31) that the federal Executive Branch has asserted, and that the courts have recognized, a federal governmental immunity from administrative adjudications that is inconsistent with the FMC's exercise of jurisdiction here. That claim is incorrect.

A. Respondent relies in part (see Br. 28-31) on two Executive Branch documents—a published opinion of the Justice Department's Office of Legal Counsel (OLC), see Resp. Br. App. 4a-21a, and the government's brief (No. 93-9551) in *Hensel* v. *Office of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994)—addressing application of the antidiscrimination provision of the Immigration Reform and Control Act of 1986, 8 U.S.C. 1324b(a)(1) (Antidiscrimination Provision), to the activities of the federal government. That provision prohibits various forms of employment discrimination by any "person or other entity" based on national origin or citizenship status, and it is enforced through administrative proceedings brought by the Special Counsel for Immigration Related Unfair Employment Practices, subject to judicial review. See Resp. Br. App. 5a.

The OLC opinion and the government's brief in *Hensel* are inapposite here. The thrust of both documents was that an agency of the federal government is not a "person or other entity" within the meaning of the Antidiscrimination Provision and therefore is not subject to that Provision's *substantive* requirements. See Resp. Br. App. 8a, 20a (OLC opinion); 93-9551 Gov't C.A. Br. (*Hensel*) at 21-28. Neither the OLC opinion nor the brief in *Hensel* contemplated a regime in which a government agency is subject to a statute's substantive provisions yet exempt from the

administrative enforcement mechanisms that apply to other entities.[8]

Respondent's reliance (Br. 27-28) on *West* v. *Gibson*, 527 U.S. 212 (1999), is also misplaced. The question presented in that case was "whether the Equal Employment Opportunity Commission (EEOC) possesses the legal authority to require federal agencies to pay compensatory damages when they discriminate in employment in violation of Title VII of the Civil Rights Act of 1964." *Id.* at 214. It was undisputed that the Civil Rights Act, as amended in 1991 (Pub. L. No. 102-166, 105 Stat. 1071), renders the federal government liable for compensatory damages for violations of the Act; the only question was whether that liability could be enforced through administrative proceedings brought before the EEOC. See 527 U.S. at 215-216, 222. The Court observed that "[b]ecause the relationship of this kind of administrative question to the goals and purposes of the doctrine of sovereign immunity may be unclear, ordinary sovereign immunity presumptions may not apply." *Id.* at 222. The Court, therefore, expressly *declined* to determine whether entrustment to the EEOC of authority to enforce an acknowledged legal obligation raised distinct sovereign immunity concerns. "If we must apply a specially strict standard in such a case, *which question we need not decide*, that standard is met

[8] The OLC opinion stated that application of the Antidiscrimination Provision to federal agencies would raise separation-of-powers concerns, because the Special Counsel is authorized to file suit in federal court to enforce an administrative order finding a violation, and "[s]uch intra-executive branch litigation likely would contravene Articles II and III of the Constitution." Resp. Br. App. 16a. The OLC opinion did not suggest, however, that subjecting federal agencies to *administrative* enforcement mechanisms would itself be constitutionally problematic. To the contrary, OLC "assume[d] for purposes of this opinion that sovereign immunity would not bar administrative proceedings in which one executive agency would press charges against another executive agency and final decisional authority would be vested in the Executive." *Id.* at 8a n.3.

here." *Ibid.* (emphasis added). *West* therefore does not further respondent's position.

B. *Hensel* and *West* provide little assistance to respondent because in the context of federal sovereign immunity, the question for the Court is typically one of statutory construction. With rare exceptions (see, *e.g.*, note 8, *supra*), Congress possesses unquestioned *power* to subject federal agencies to whatever enforcement mechanisms it deems appropriate to ensure compliance with valid federal law. Thus, when the United States invokes principles of sovereign immunity, it typically argues that a statute's terms do not reach it. Respondent, by contrast, concedes that it is covered by the plain terms of the Shipping Act, but disputes Congress's *authority* to establish an administrative complaint procedure that applies to unconsenting state entities. Respondent thus asserts not reciprocal rights, but a broader immunity from federal administrative enforcement mechanisms than federal agencies possess.

C. Respondent's claim that States must enjoy an immunity that parallels that of the federal government also cannot be reconciled with the basic constitutional structure reflected in the Supremacy Clause. Although the States are "invested with that large residuum of sovereignty which ha[s] not been delegated to the United States," *In re Ayers*, 123 U.S. 443, 505 (1887), the federal and state governments are not coequal sovereigns. The Constitution and valid federal statutes are "the supreme Law of the Land," U.S. Const. Art. VI, § 2, and supersede inconsistent state laws, even where those laws would otherwise be appropriate exercises of state authority. The States have consented *generally* to suits brought by the federal government, see, *e.g.*, *Alden*, 527 U.S. at 755-756, but the United States has given no overarching reciprocal consent to suit by the States (though it has consented to particular categories of suits). Under Section Five of the Fourteenth Amendment, Congress may authorize private suits against the States as a

means of enforcing the Amendment's substantive provisions, see, *e.g.*, *Alden*, 527 U.S. at 756; but no constitutional provision permits state legislatures to authorize private suits against the United States. Perhaps most significantly, while Congress possesses broad authority to subject state instrumentalities to the substantive requirements of federal law, see, *e.g.*, *Reno* v. *Condon*, 528 U.S. 141, 148-151 (2000), States possess no corresponding power to impose their law on federal agencies.[9] Thus, insofar as respondent's position rests on a supposed equivalence between the sovereign prerogatives of the state and federal governments, it reflects a basic misunderstanding of the constitutional plan.[10]

IV. RESPONDENT HAS NO BASIS FOR CLAIMING IMMUNITY FROM THE NON-MONETARY RELIEF SOUGHT IN THE ADMINISTRATIVE COMPLAINT

The administrative complaint filed by Maritime Services requested that the FMC "bring suit in a district court of the United States to enjoin conduct in violation of the Shipping Act." J.A. 15. Specifically, the administrative complaint "re-

[9] "This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979). Absent a contrary congressional directive, "state law may be incorporated as the federal rule of decision." *Id.* at 728. But if "application of state law would frustrate specific objectives of the federal programs," the federal courts "must fashion special rules solicitous of those federal interests." *Ibid.* The crucial point is that state law applies to federal agencies not of its own force, but only insofar as it is incorporated as federal law.

[10] Federal and state sovereign immunity principles also differ in that the former are informed by separation-of-powers considerations that reflect the Constitution's express conferral to Congress of the power of appropriations and property disposition. See U.S. Amicus Br. at 18 n.6, *Lapides* v. *Board of Regents of Univ. of Ga. Sys.*, No. 01-298. Of course, just as the Appropriations and Property Clauses inform the scope of the federal government's sovereign immunity, the Eleventh Amendment informs the scope of the immunity of the States.

quest[ed] that the Commission file suit against [respondent] in the United States District Court for the District of South Carolina, Charleston Division, and seek a temporary restraining order and preliminary injunction." *Ibid.*; see also J.A. 16. Maritime Services identified its request that the FMC seek injunctive relief as a ground for denying respondent's motion to dismiss the administrative complaint, see J.A. 51-52, but the ALJ rejected that argument. See Pet. App. 41a n.1. The Act authorizes the FMC to seek such relief, see 46 U.S.C. app. 1710(h), and respondent would enjoy no immunity in such a suit. A private party is free to request that federal officials authorized to conduct litigation on behalf of the government file suit in a particular instance; the fact that such a request is contained in a document styled a "complaint" does not implicate the State's sovereign immunity. Thus, even if principles of sovereign immunity precluded the FMC from issuing a reparation order against respondent, the court of appeals erred in dismissing Maritime Services' administrative complaint in its entirety.

Respondent's only argument on this point (see Br. 21-22 n.7) is that the pleading rule of *Ex parte Young*, 209 U.S. 123 (1908) should apply in FMC proceedings, and that the administrative complaint filed by Maritime Services is therefore subject to dismissal because it named a state agency rather than a state officer as respondent. It is entirely unclear why that should be the case. The complainant requested that the FMC seek injunctive relief in federal district court, and in such a suit the FMC could name respondent as the defendant. Moreover, if Maritime Services itself sought interim injunctive relief in court (as authorized by the Act, 46 U.S.C. app. 1710(h)(2)), it could adjust the caption of its complaint to comply with *Ex parte Young*.

The administrative complaint also sought a cease-and-desist order from the FMC itself, but even with respect to that (not self-executing) relief, there is no reason to extend *Ex parte Young* pleading requirements to FMC proceedings.

In holding that private suits against the States are barred regardless of the relief sought, this Court has explained that the Eleventh Amendment not only protects the State's fiscal integrity, but "also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe*, 517 U.S. at 58 (quoting *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). Because the FMC is not a "judicial tribunal[]" and cannot issue "coercive process" enforceable through the power of contempt, that justification is inapplicable by its terms.

Moreover, to the extent that naming a State or state agency as the defendant in a lawsuit might be thought to impose dignitary harms over and above whatever more tangible impacts the litigation entails, that concern is substantially reduced in the context of administrative enforcement mechanisms. Specification of the person(s) whom the plaintiff seeks to hold legally liable is an integral feature of a complaint filed in court. But private parties may and often do inform Executive Branch officials of apparent violations of law without identifying the wrongdoers. There is no principled reason why the resultant agency process should not proceed directly against the state entity that is subject to the substantive regulatory authority that the agency administers. Accordingly, even if the Court were to recognize a new immunity for States in FMC reparation proceedings, that immunity would not properly extend to efforts to obtain non-monetary relief, and the court of appeals' judgment ordering dismissal of the administrative complaint in its entirety would be subject to reversal.

* * * * *

For the foregoing reasons and those stated in the opening brief for the United States, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

FEBRUARY 2002

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No. 01-46

IN THE

SUPREME COURT OF THE UNITED STATES

FEDERAL MARITIME COMMISSION,
PETITIONER,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
RESPONDENT.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

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17 pp

MOTION OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Association of Waterfront Employers ("NAWE") is a nationwide association of private sector maritime terminal operators subject to regulation under federal law by Petitioner, the Federal Maritime Commission. Respondent, South Carolina State Ports Authority, is a maritime terminal operator arguing that it is not subject to the private complaint jurisdiction of the Federal Maritime Commission because it is entitled to sovereign immunity as a State agency. NAWE's members, being subject to federal regulation, have an interest in ensuring that federal regulation applies equally to all maritime terminal operators, including State agencies such as Respondent. NAWE filed a brief *amicus curiae* in the court below in support of the Federal Maritime Commission.

NAWE wishes to file the attached brief to argue that those who wrote and ratified the Constitution intended the sovereign immunity of the States to yield to the need for a uniform, national power over maritime commerce.

The Federal Maritime Commission has consented to the filing of NAWE's brief, and its letter of consent has been filed with the Clerk of this Court. South Carolina State Ports Authority has withheld consent, as it also did in the court below.

Wherefore, NAWE prays to be given leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED

Whether the moving force behind the Constitution was the need to constrain States with maritime ports from using those ports to discriminate against the maritime commerce of citizens of other States and of foreign nations.

Whether Congress has intended to provide a federal forum for the adjudication of private domestic and foreign complaints against States that discriminate in the operation of their maritime ports.

Whether it is within the power of Congress under Article I to prevent discrimination in the operation of State-owned maritime ports by authorizing private adjudication before the Federal Maritime Commission.

Whether, in any event, it is within the power of Congress under the Equal Protection Clause of the Fourteenth Amendment to prevent discrimination in the operation of State-owned maritime ports by authorizing private adjudication before the Federal Maritime Commission.*

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* In accordance with this Court's Rule 37.6, counsel of record states that he is the sole author of this brief and that no person or entity other than the named *amicus* party has made a monetary contribution to the preparation or submission of this brief.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. The moving force behind the Constitution was the need to constrain States with maritime ports from using those ports to discriminate against the maritime commerce of citizens of other States and of foreign nations	2
II. Congress has chosen to encourage the foreign maritime commerce of the United States by prohibiting disparate treatment in the operation of maritime ports and by establishing a simple and uniform regulatory process	7
III. If the federal government has exclusive sovereignty over the maritime commerce of the United States, then the federal government may preclude the States from exercising any "economic advantage" by State ownership of the maritime ports within their borders	8
IV. In any event, the Fourteenth Amendment gives Congress the power to require the States to answer complaints of disparate treatment by port users	9
CONCLUSION	10

TABLE OF AUTHORITIES

CONSTITUTION — Page

Article I 8
Fourteenth Amendment 9

CONSTITUTIONAL HISTORY

Benjamin Harrison (Governor of Virginia)

Letter to Thomas Jefferson, dated April 16, 1784, J. Boyd (ed.), 7 THE PAPERS OF THOMAS JEFFERSON 678 (Princeton Univ. Press 1953) 3

Thomas Jefferson

Letter to James Monroe, dated June 17, 1785, J. Boyd (ed.), 8 THE PAPERS OF THOMAS JEFFERSON 231 (Princeton Univ. Press 1953) 2

Letter to Edward Carrington, dated August 4, 1787, J. Boyd (ed.), 11 THE PAPERS OF THOMAS JEFFERSON 678 (Princeton Univ. Press 1955) 6

James Madison

"Vices of the Political System of the United States," dated April 1787, P. Kurland (ed.), 1 THE FOUNDERS' CONSTITUTION 166 (Univ. of Chicago Press 1987) 5

George Washington

Letter to James Warren, dated October 7, 1785, P. Kurland (ed.), 1 THE FOUNDERS' CONSTITUTION 161 (Univ. of Chicago Press 1987) 3

TABLE OF AUTHORITIES—Continued

Page

"Proceedings of Commissioners to Remedy Defects of the Federal Government," dated September 14, 1786. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. Facsimile available at www.yale.edu/lawweb/avalon/annapoli.htm 5

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CASES

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2000) 9
California v. United States, 320 U.S. 577 (1944) .. 7
United States v. Lopez, 514 U.S. 549 (1995) 8

STATUTES

46 U.S.C. App. § 1701(1) 7
46 U.S.C. App. § 1701(4) 7

LEGISLATIVE HISTORY

53 Cong. Rec. 8276 (1916) 7

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

INTRODUCTION

This case presents for the first time a clash between State sovereign immunity and the moving force behind the Constitution: the need for uniformity in maritime commerce. Between 1781 and 1787, States with maritime ports discriminatorily denied the use of those ports to the maritime commerce of other States and of England, France, and Holland. The Constitutional Convention was called to restrain this maritime trade war, which threatened the unity and peace of this new nation. This clash of principles is of paramount importance because it gave us the Constitution. Such a clash deserves the attention of this Court.

More is at stake here than one instance of alleged maritime discrimination by South Carolina. Twenty-one other States supported South Carolina as *amici curiae* in the court below. The widespread State participation in this case adds to the propriety of Supreme Court review at this time.

INTEREST OF THE *AMICUS CURIAE*

The interest of the National Association of Waterfront Employers as *amicus curiae* is described in the motion for leave to file that accompanies this brief.

SUMMARY OF ARGUMENT

The maritime ports of the United States are points of entry and exit for the ocean commerce of the nation as a whole. The ports are limited in number and serve large areas of the nation that have no other means of ocean access. A State can have sovereign immunity in the operation of maritime ports within its borders only if the constitutional structure gives to

each maritime State a measure of sovereignty over the ocean commerce of the nation as a whole, an untenable result. The Founders intended in the constitutional structure to preserve State sovereignty, but not over maritime commerce.

Congressional power over maritime commerce, including its starting and ending points, is plenary. The court below concedes that Congress could operate the maritime ports directly. It follows that the States may operate maritime ports only with the consent of Congress and under such conditions as Congress may impose.

ARGUMENT

I. The moving force behind the Constitution was the need to constrain States with maritime ports from using those ports to discriminate against the maritime commerce of citizens of other States and of foreign nations.

The Founders regarded the maritime competition between the States after the Revolutionary War as the greatest threat to the prosperity and even the survival of the United States. In 1784 Thomas Jefferson succeeded Benjamin Franklin as America's ambassador to France. From that vantage point Jefferson saw the harm that the States were doing to themselves and to each other in their competition for trade. In 1785 he wrote to James Monroe:

> You see that my primary object in the formation of treaties is to **take the commerce of the states out of the hands of the states**, and to place it under the superintendence of Congress, so far as the imperfect provisions of our constitution will admit, and until the states shall by new compact make them more perfect. I would say then to every nation on earth, __ by treaty __, your people shall trade freely with us, & ours with you, paying no more than the most favoured nation, **in order to put an end to the right of individual states** acting by fits

> and starts **to interrupt our commerce or to embroil us with any nation.**

Letter from Thomas Jefferson to James Monroe dated June 17, 1785, printed in J. Boyd (ed.), 8 THE PAPERS OF THOMAS JEFFERSON 231 (Princeton Univ. Press 1953) (JEFFERSON PAPERS) (emphasis added). Later that year, George Washington wrote:

> [W]e have abundant reason to be convinced, that the spirit for Trade which pervades these States is not to be restrained; it behooves us then to establish just principles; and this, any more than other matters of national concern, cannot be done by thirteen heads differently constructed and organized. The necessity therefore, of a controuling power is obvious; and why it should be withheld is beyond my comprehension.

Letter from George Washington to James Warren dated October 7, 1785, printed in P. Kurland (ed.), 1 THE FOUNDERS' CONSTITUTION 161 (Univ. of Chicago Press 1987) (FOUNDERS' CONSTITUTION).

In early 1784, the Governor of Virginia, Benjamin Harrison, had "anxiously" written to Jefferson, who was then representing Virginia in the Congress, about the trade problem:

> I am anxious to hear whether the other States have followed our example in giving powers to Congress so to regulate the trade of the whole United States as to make effectual oppositions to the restrictions of Great Britain. . . . I am much at a loss to assign a good reason for the refusal of any State so coming into the measure as every man of Sense must see that no effectual opposition can be made individually and that without one takes place immediately it will be hereafter very difficult to force great Britain into measures that may be reciprocally advantageous.

Letter from Harrison to Jefferson dated April 16, 1784, 7 JEFFERSON PAPERS 102.

In 1786, Virginia took the lead. On January 21 of that year the General Assembly of Virginia passed a resolution calling for a uniform system of commerce:

> *Resolved*, That Edmund Randolph, James Madison, jun. Walter Jones, Saint George Tucker and Meriwether Smith, Esquires, be appointed commissioners, who, or any three of whom, shall meet such commissioners as may be appointed by the other States in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same.

DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. A facsimile is available at the Internet site of the Avalon Project at Yale Law School, www.yale.edu/lawweb/avalon/const/const03.htm.

The Virginia Resolution led to a meeting in Annapolis, Maryland on September 11-14, 1786, attended by delegates from New York, New Jersey, Pennsylvania, Delaware, and Virginia. The Annapolis delegates were empowered only to make recommendations on the commerce problem, but they decided "that the power of regulating trade is of such comprehensive extent, and will enter so far into the general System of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other

parts of the Federal System." "Proceedings of Commissioners to Remedy Defects of the Federal Government" dated September 14, 1786. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. A facsimile is available at www.yale.edu/lawweb/avalon/annapoli.htm. The Annapolis delegates recommended that Congress call a convention of all the States. *Id.*

Preparing himself for the Convention, James Madison in April 1787 drew up a list of the "Vices of the Political System of the United States." 1 FOUNDERS' CONSTITUTION 166. This remarkable document reveals that the States, in their competition for the maritime commerce of the warring European Powers, had broken the treaty of peace with Britain, the treaty of friendship with France, and the treaty of commerce with Holland. Madison feared that this "frequent violation of the law of nations" could eventually cause "the greatest of public calamities," war with all of the Powers. He wrote:

> 3. Violations of the law of nations and of treaties.
>
> . . . [N]ot a year has passed without instances of them in some one or other of the States. The Treaty of peace—the treaty with France—the treaty with Holland have each been violated. The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.
>
> As yet foreign powers have not been rigorous in animadverting on us. This moderation cannot however be mistaken for a permanent partiality to our faults, or a permanent security agst. those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring upon the whole.

> 4. Trespasses of the States on the rights of each other.
>
> These are alarming symptoms, and may be daily apprehended as we are admonished by daily experience. See the law of Virginia restricting foreign vessels to certain ports—of Maryland in favor of vessels belonging to her own citizens—of N. York in favor of the same.

1 FOUNDERS' CONSTITUTION 167.

Jefferson continued to urge, as he had in 1785, that "the commerce of the states [be taken] out of the hands of the states." Writing from Paris during the Constitutional Convention, he said: "My general plan would be to make the states one as to everything connected with foreign nations, and several as to everything purely domestic. . . . [The] greatest defect [of our government] is the imperfect manner in which matters of commerce have been provided for." Letter from Jefferson to Edward Carrington dated August 4, 1787, 11 JEFFERSON PAPERS 678.

It seems clear that the Founders would be astonished and dismayed to learn from the case now before this Court that State sovereignty is being used to impair the methods chosen by the Federal Government to regulate maritime commerce. Jefferson's call "to make the states as one" in maritime commerce leaves no room for State sovereign immunity over maritime trade. Maritime ports belong to the nation as a whole. The States that choose to own and operate maritime ports do so in public trust for the benefit of all. That trust is part of the original understanding. The court of appeals was wrong to make State-owned maritime ports less subject to the public trust than ports that are privately owned.

II. Congress has chosen to encourage the foreign maritime commerce of the United States by prohibiting disparate treatment in the operation of maritime ports and by establishing a simple and uniform regulatory process.

Congress has established "a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs." 46 U.S.C. App. § 1701(1). Congress has rejected eighteenth century mercantilism in favor of "a greater reliance on the marketplace." 46 U.S.C. App. § 1701(4). There is no place in the Congressional scheme for substantive governmental control of the nation's maritime economy by the States.

To accomplish its objectives, Congress has said that States choosing to operate maritime ports must do so under the rules applicable to private operations. As the House Manager said in the debate leading to passage of the Shipping Act of 1916, "[i]f they do exercise such discrimination, there is no reason why they should not be amenable to the law as well as a private person." 53 Cong. Rec. 8276 (May 16, 1916). The question to the House Manager spoke of "municipal wharves," but this Court has determined that the Congressional Record exchange and the Shipping Act encompass all "public owners of wharves and piers," including those of the States. *California v. United States*, 320 U.S. 577, 585-86 (1944).

The court below held the States to be immune, because of their sovereignty, from private process to enforce the Shipping Act before the Federal Maritime Commission. The court acknowledged that its decision might impede "maritime efficiencies" and produce "economic advantage," but held the concept of State sovereign immunity to be constitutionally more important than the free and uniform flow of the nation's maritime commerce. Petition Appendix at 24a. The court's

holding is at odds with our constitutional history, which teaches that the States yielded to the federal government all sovereignty over the maritime commerce of the United States.

III. If the federal government has exclusive sovereignty over the maritime commerce of the United States, then the federal government may preclude the States from exercising any "economic advantage" by State ownership of the maritime ports within their borders.

State ownership of maritime ports is a throwback to the discredited mercantilist theory of the eighteenth century. The States have no constitutional "right" to exercise separate sovereignty over the maritime ports of the United States by owning them. The court below acknowledged that "if Congress so chose it could regulate all matters affecting ocean-borne commerce." Petition Appendix at 23a. The court of appeals cited Article I of the Constitution and this Court's decision in *United States v. Lopez*, 514 U.S. 549, 558 (1995), which it read as holding that the "Commerce Clause allows direct regulation of the channels of interstate commerce." Petition Appendix at 23a.

Maritime ports are channels of interstate commerce. If Congress has the power under Article I to take direct control of them, then Congress has the lesser-included power of permitting State ownership of maritime ports subject to whatever conditions Congress may impose, including the Shipping Act requirement that the States answer complaints of discrimination filed by port users before the Federal Maritime Commission.

IV. In any event, the Fourteenth Amendment gives Congress the power to require the States to answer complaints of disparate treatment by port users.

Congress has clearly expressed an intent make the States answer to private complaints of disparate treatment in the operation of their maritime ports. The Founders identified a history and pattern of such discrimination, and they sought to prevent the conduct by binding the States to the Constitution. The Shipping Act, enacted after the adoption of the Fourteenth Amendment, seeks to carry out the intent of the Founders. The court below held that the Fourteenth Amendment was not in issue because Congress had not purported to use it as a basis for the Shipping Act. Petition Appendix at 21a. The Shipping Act does, however, prohibit the disparate treatment of maritime port users. Congress aimed at conduct proscribed by the Fourteenth Amendment. Since the requirements of the Fourteenth Amendment are otherwise met, no reason appears why State-sponsored disparate treatment between port users should go unremedied if there is not a "rational relationship between the disparity of the treatment and some legitimate governmental purpose." *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 964 (2000) (quotation marks and citations omitted). The complaining party before the Federal Maritime Commission alleged disparate treatment at the Port of Charleston by the State of South Carolina, and should be allowed to put on proof.

CONCLUSION

The Petition of the Federal Maritime Commission should be granted.

Respectfully submitted,

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September 10, 2001

EDITOR'S NOTE

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FEDERAL MARITIME COMMISSION,
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On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

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14 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
INTEREST OF THE *AMICUS* AND CONSENT OF THE PARTIES	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. The moving force behind the Constitution was the need to constrain States with maritime ports from using those ports to discriminate against the maritime commerce of citizens of other States and of foreign nations	2
II. Congress has chosen to encourage the foreign maritime commerce of the United States by prohibiting disparate treatment in the operation of maritime ports and by establishing a simple and uniform regulatory process	7
III. If the federal government has exclusive sovereignty over the maritime commerce of the United States, then the federal government may preclude the States from exercising any "economic advantage" by State ownership of the maritime ports within their borders	8
IV. In any event, the Fourteenth Amendment gives Congress the power to require the States to answer complaints of disparate treatment by port users	9
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
CONSTITUTION	
Article I	8
Fourteenth Amendment	9
CONSTITUTIONAL HISTORY	
Benjamin Harrison (Governor of Virginia)	
Letter to Thomas Jefferson, dated April 16, 1784, J. Boyd (ed.), 7 THE PAPERS OF THOMAS JEFFERSON 678 (Princeton Univ. Press 1953)	3-4
Thomas Jefferson	
Letter to James Monroe, dated June 17, 1785, J. Boyd (ed.), 8 THE PAPERS OF THOMAS JEFFERSON 231 (Princeton Univ. Press 1953)	3
Letter to Edward Carrington, dated August 4, 1787, J. Boyd (ed.), 11 THE PAPERS OF THOMAS JEFFERSON 678 (Princeton Univ. Press 1955)	6
James Madison	
"Vices of the Political System of the United States," dated April 1787, B. Kurland (ed.), 1 THE FOUNDERS' CONSTITUTION 166 (Univ. of Chicago Press 1987)	5-6
George Washington	
Letter to James Warren, dated October 7, 1785, B. Kurland (ed.), 1 THE FOUNDERS' CONSTITUTION 161 (Univ. of Chicago Press 1987)	3

TABLE OF AUTHORITIES—Continued

	Page
"Proceedings of Commissioners to Remedy Defects of the Federal Government," dated September 14, 1786. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. Facsimile available at www.yale.edu/lawweb/avalon/annapoli.htm	5
"Resolution of the General Assembly of Virginia," dated January 21, 1786. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. Facsimile available at www.yale.edu/lawweb/avalon/const/const03.htm	4
CASES	
Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2000)	9
California v. United States, 320 U.S. 577 (1944)	7
United States v. Lopez, 514 U.S. 549 (1995)	8
STATUTES	
46 U.S.C. App. § 1701(1)	7
46 U.S.C. App. § 1701(4)	7
LEGISLATIVE HISTORY	
53 Cong. Rec. 8276 (1916)	7

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

INTRODUCTION

This case presents for the first time a clash between State sovereign immunity and the moving force behind the Constitution: the need for uniformity in maritime commerce. Between 1781 and 1787, States with maritime ports discriminatorily denied the use of those ports to the maritime commerce of other States and of England, France, and Holland. The Constitutional Convention was called to restrain this maritime trade war, which threatened the unity and peace of this new nation. Those who wrote and ratified the Constitution intended the sovereign immunity of the States to yield to the need for a uniform power over maritime commerce.*

INTEREST OF THE *AMICUS* AND CONSENT OF THE PARTIES

The National Association of Waterfront Employers ("NAWE") is a nationwide association of private sector maritime terminal operators subject to regulation under federal law by Petitioner, the Federal Maritime Commission. Respondent, South Carolina State Ports Authority, is a maritime terminal operator arguing that it is not subject to the private complaint jurisdiction of the Federal Maritime Commission because it is entitled to sovereign immunity as a State agency. NAWE's members, being subject to federal

* In accordance with this Court's Rule 37.6, counsel of record states that he is the sole author of this brief and that no person or entity other than the named *amicus* party has made a monetary contribution to the preparation or submission of this brief.

regulation, have an interest in ensuring that federal regulation applies equally to all maritime terminal operators, including State agencies such as Respondent.

The parties have consented to the filing of NAWE's brief, and their letters of consent have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The maritime ports of the United States are points of entry and exit for the ocean commerce of the nation as a whole. The ports are limited in number and serve large areas of the nation that have no other means of ocean access. A State can have sovereign immunity in the operation of maritime ports within its borders only if the constitutional structure gives to each maritime State a measure of sovereignty over the ocean commerce of the nation as a whole, an untenable result. The Founders intended in the constitutional structure to preserve State sovereignty, but not over maritime commerce.

Congressional power over maritime commerce, including its starting and ending points, is plenary. The court below concedes that Congress could operate the maritime ports directly. It follows that the States may operate maritime ports only with the consent of Congress and under such conditions as Congress may impose.

ARGUMENT

I. The moving force behind the Constitution was the need to constrain States with maritime ports from using those ports to discriminate against the maritime commerce of citizens of other States and of foreign nations.

The Founders regarded the maritime competition between the States after the Revolutionary War as the greatest threat to the prosperity and even the survival of the United States. In 1784 Thomas Jefferson succeeded Benjamin Franklin as America's ambassador to France. From that vantage point

Jefferson saw the harm that the States were doing to themselves and to each other in their competition for trade. In 1785 he wrote to James Monroe:

> You see that my primary object in the formation of treaties is to **take the commerce of the states out of the hands of the states**, and to place it under the superintendence of Congress, so far as the imperfect provisions of our constitution will admit, and until the states shall by new compact make them more perfect. I would say then to every nation on earth,—by treaty—, your people shall trade freely with us, & ours with you, paying no more than the most favoured nation, **in order to put an end to the right of individual states** acting by fits and starts **to interrupt our commerce or to embroil us with any nation.**

Letter from Thomas Jefferson to James Monroe dated June 17, 1785, printed in J. Boyd (ed.), 8 THE PAPERS OF THOMAS JEFFERSON 231 (Princeton Univ. Press 1953) (JEFFERSON PAPERS) (emphasis added). Later that year, George Washington wrote:

> [W]e have abundant reason to be convinced, that the spirit for Trade which pervades these States is not to be restrained; it behooves us then to establish just principles; and this, any more than other matters of national concern, cannot be done by thirteen heads differently constructed and organized. The necessity therefore, of a controuling power is obvious; and why it should be withheld is beyond my comprehension.

Letter from George Washington to James Warren dated October 7, 1785, printed in B. Kurland (ed.), 1 THE FOUNDERS' CONSTITUTION 161 (Univ. of Chicago Press 1987) (FOUNDERS' CONSTITUTION).

In early 1784, the Governor of Virginia, Benjamin Harrison, had "anxiously" written to Jefferson, who was

then representing Virginia in the Congress, about the trade problem:

> I am anxious to hear whether the other States have followed our example in giving powers to Congress so to regulate the trade of the whole United States as to make effectual oppositions to the restrictions of Great Britain. . . . I am much at a loss to assign a good reason for the refusal of any State so coming into the measure as every man of Sense must see that no effectual opposition can be made individually and that without one takes place immediately it will be hereafter very difficult to force great Britain into measures that may be reciprocally advantageous.

Letter from Harrison to Jefferson dated April 16, 1784, 7 JEFFERSON PAPERS 102.

In 1786, Virginia took the lead. On January 21 of that year the General Assembly of Virginia passed a resolution calling for a uniform system of commerce:

> *Resolved*, That Edmund Randolph, James Madison, jun. Walter Jones, Saint George Tucker and Meriwether Smith, Esquires, be appointed commissioners, who, or any three of whom, shall meet such commissioners as may be appointed by the other States in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same.

DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. A facsimile is available at the Internet site of the Avalon Project at Yale Law School, www.yale.edu/lawweb/avalon/const/const03.htm.

The Virginia Resolution led to a meeting in Annapolis, Maryland on September 11-14, 1786, attended by delegates from New York, New Jersey, Pennsylvania, Delaware, and Virginia. The Annapolis delegates were empowered only to make recommendations on the commerce problem, but they decided "that the power of regulating trade is of such comprehensive extent, and will enter so far into the general System of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Federal System." "Proceedings of Commissioners to Remedy Defects of the Federal Government" dated September 14, 1786. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. A facsimile is available at www.yale.edu/lawweb/avalon/annapoli.htm. The Annapolis delegates recommended that Congress call a convention of all the States. *Id.*

Preparing himself for the Convention, James Madison in April 1787 drew up a list of the "Vices of the Political System of the United States." 1 FOUNDERS' CONSTITUTION 166. This remarkable document reveals that the States, in their competition for the maritime commerce of the warring European Powers, had broken the treaty of peace with Britain, the treaty of friendship with France, and the treaty of commerce with Holland. Madison feared that this "frequent violation of the law of nations" could eventually cause "the greatest of public calamities," war with all of the Powers. He wrote:

> 3. Violations of the law of nations and of treaties.
>
> . . . [N]ot a year has passed without instances of them in some one or other of the States. The Treaty

of peace—the treaty with France—the treaty with Holland have each been violated. The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.

As yet foreign powers have not been rigorous in animadverting on us. This moderation cannot however be mistaken for a permanent partiality to our faults, or a permanent security agst. those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring upon the whole.

4. Trespasses of the States on the rights of each other.

These are alarming symptoms, and may be daily apprehended as we are admonished by daily experience. See the law of Virginia restricting foreign vessels to certain ports—of Maryland in favor of vessels belonging to her own citizens—of N: York in favor of the same.

1 FOUNDERS' CONSTITUTION 167.

Jefferson continued to urge, as he had in 1785, that "the commerce of the states [be taken] out of the hands of the states." Writing from Paris during the Constitutional Convention, he said: "My general plan would be to make the states one as to everything connected with foreign nations, and several as to everything purely domestic. . . . [The] greatest defect [of our government] is the imperfect manner in which matters of commerce have been provided for." Letter from Jefferson to Edward Carrington dated August 4, 1787, 11 JEFFERSON PAPERS 678.

It seems clear that the Founders would be astonished and dismayed to learn from the case now before this Court that State sovereignty is being used to impair the methods chosen by the Federal Government to regulate maritime commerce.

Jefferson's call "to make the states one" in maritime commerce leaves no room for State sovereign immunity over maritime trade. Maritime ports belong to the nation as a whole. The States that choose to own and operate maritime ports do so in public trust for the benefit of all. That trust is part of the original understanding. The court of appeals was wrong to make State-owned maritime ports less subject to the public trust than ports that are privately owned.

II. Congress has chosen to encourage the foreign maritime commerce of the United States by prohibiting disparate treatment in the operation of maritime ports and by establishing a simple and uniform regulatory process.

Congress has established "a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs." 46 U.S.C. App. § 1701(1). Congress has rejected eighteenth century mercantilism in favor of "a greater reliance on the marketplace." 46 U.S.C. App. § 1701(4). There is no place in the Congressional scheme for substantive governmental control of the nation's maritime economy by the States.

To accomplish its objectives, Congress has said that States choosing to operate maritime ports must do so under the rules applicable to private operations. As the House Manager said in the debate leading to passage of the Shipping Act of 1916, "[i]f they do exercise such discrimination, there is no reason why they should not be amenable to the law as well as a private person." 53 Cong. Rec. 8276 (May 18, 1916). The question to the House Manager spoke of "municipal wharves," but this Court has determined that the Congressional Record exchange and the Shipping Act encompass all "public owners of wharves and piers," including those of the States. *California v. United States*, 320 U.S. 577, 585-86 (1944).

The court below held the States to be immune, because of their sovereignty, from private process to enforce the Shipping Act before the Federal Maritime Commission. The court acknowledged that its decision might impede "maritime efficiencies" and produce "economic advantage," but held the concept of State sovereign immunity to be constitutionally more important than the free and uniform flow of the nation's maritime commerce. Petition Appendix at 24a. The court's holding is at odds with our constitutional history, which teaches that the States yielded to the federal government all sovereignty over the maritime commerce of the United States.

III. If the federal government has exclusive soverignty over the maritime commerce of the United States, then the federal government may preclude the States from exercising any "economic advantage" by State ownership of the maritime ports within their borders.

State ownership of maritime ports is a throwback to the discredited mercantilist theory of the eighteenth century. The States have no constitutional "right" to exercise separate sovereignty over the maritime ports of the United States by owning them. The court below acknowledged that "if Congress so chose it could regulate all matters affecting ocean-borne commerce." Petition Appendix at 23a. The court of appeals cited Article I of the Constitution and this Court's decision in *United States v. Lopez*, 514 U.S. 549, 558 (1995), which it read as holding that the "Commerce Clause allows direct regulation of the channels of interstate commerce." Petition Appendix at 23a.

Maritime ports are channels of interstate commerce. If Congress has the power under Article I to take direct control of them, then Congress has the lesser-included power of permitting State ownership of maritime ports subject to whatever conditions Congress may impose, including the Shipping Act requirement that the States answer complaints

of discrimination filed by port users before the Federal Maritime Commission.

IV. In any event, the Fourteenth Amendment gives Congress the power to require the States to answer complaints of disparate treatment by port users.

Congress has clearly expressed an intent make the States answer to private complaints of disparate treatment in the operation of their maritime ports. The Founders identified a history and pattern of such discrimination, and they sought to prevent the conduct by binding the States to the Constitution. The Shipping Act, enacted after the adoption of the Fourteenth Amendment, seeks to carry out the intent of the Founders. The court below held that the Fourteenth Amendment was not in issue because Congress had not purported to use it as a basis for the Shipping Act. Petition Appendix at 21a. The Shipping Act does, however, prohibit the disparate treatment of maritime port users. Congress aimed at conduct proscribed by the Fourteenth Amendment. Since the requirements of the Fourteenth Amendment are otherwise met, no reason appears why State-sponsored disparate treatment between port users should go unremedied if there is not a "rational relationship between the disparity of the treatment and some legitimate governmental purpose." *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 964 (2000) (quotation marks and citations omitted). The complaining party before the Federal Maritime Commission alleged disparate treatment at the Port of Charleston by the State of South Carolina, and should be allowed to put on proof.

CONCLUSION

The decision of the court of appeals, which prevents the Federal Maritime Commission from exercising private complaint jurisdiction over State-owned maritime ports, should be reversed.

Respectfully submitted,

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No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,

Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR SENATORS EDWARD M. KENNEDY AND RUSSELL D. FEINGOLD AS AMICI CURIAE IN SUPPORT OF PETITIONER

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35 pp

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF AMICI 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

BACKGROUND 3

A. The Statutory and Regulatory Framework. 3

B. The Present Case. 6

ARGUMENT 8

I. STATES HAVE NO SOVEREIGN IMMUNITY AS AGAINST THE UNITED STATES. 8

II. AN AGENCY PROCEEDING IS THE PROCESS BY WHICH THE EXECUTIVE DECIDES HOW IT WILL ENFORCE FEDERAL LAW. 12

III. A STATE DOES NOT HAVE IMMUNITY IN A COMMISSION PROCEEDING AS ANY COMPULSION RESULTS FROM THE ACTION OF THE UNITED STATES. 20

A. Sovereign Immunity Protects a State From Coercion by a Private Party. 21

B. Private Parties and the Commission Do Not Have Independent Coercive Powers and Any Coercion in the Regulatory Scheme Is the Power of the United States. 23

1. Stigmatic Harm 23

2. Enforcement Action by Private Party 24

3. Enforcement Action by the United States 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Page(s)

Alden v. Maine, 527 U.S. 706 (1999) ..... *passim*
Bennett v. Spear, 520 U.S. 154 (1997) 16
California v. United States, 320 U.S. 577 (1944) 1, 3, 4, 9, 15
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 13, 14, 19, 26
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 1, 22, 24, 26
Coyle v. Smith, 221 U.S. 559 (1911) 2
EEOC v. Wyoming, 460 U.S. 226 (1983) 27, 28
FMC v. Port of Seattle, 521 F.2d 431 (9th Cir. 1975) 27
Fort Stewart Schools v. Federal Labor Relations Authority, 495 U.S. 641 (1990) 14
Freytag v. Commissioner, 501 U.S. 868 (1991) 17, 19
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 27, 28
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 1, 9
Hans v. Louisiana, 134 U.S. 1 (1890) 23, 24, 26
Heckler v. Campbell, 461 U.S. 458 (1983) 17
Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996) 14
INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) 14
In re Ayers, 123 U.S. 443 (1887) 23
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 14
Nevada v. Hall, 440 U.S. 410 (1979) 1, 22, 27, 28
New York v. United States, 505 U.S. 144 (1992) 2, 24, 26
Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990) 15
Petchem, Inc. v. FMC, 853 F.2d 958 (D.C. Cir. 1988) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 10, 11
Printz v. United States, 521 U.S. 898 (1997) 2
Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 9
Reno v. Condon, 528 U.S. 141 (2000) 2, 11, 12, 28
Ristow v. South Carolina Ports Authority, 58 F.3d 1051 (4th Cir. 1995) 7
SEC v. Chenery Corp., 318 U.S. 80 (1943) 16
SEC v. Chenery Corp., 332 U.S. 194 (1947) 13, 14, 15, 16
Seminole Tribe v. Florida, 517 U.S. 44 (1996) 10, 23, 27
South Carolina v. Baker, 485 U.S. 505 (1988) 2, 11
South Carolina State Ports Authority v. FMC, 243 F.3d 165 (4th Cir. 2001) 8, 12, 20, 24
United States v. Locke, 529 U.S. 89 (2000) 9
United States v. Mead Corp., 533 U.S. 218, 121 S. Ct. 2164 (2001) 14
United States v. Mississippi, 380 U.S. 128 (1965) 10
United States v. Morton Salt Co., 338 U.S. 632 (1950) 18
United States v. Texas, 143 U.S. 621 (1892) 11, 27, 28
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) 15
West Virginia v. United States, 479 U.S. 305 (1987) 10, 20, 27, 28

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. VI 9
5 U.S.C. § 553 4
5 U.S.C. §§ 553-558 13
The Hobbs Act, 28 U.S.C. § 2341 *et seq.* 6, 26
28 U.S.C. § 2344 ..... 6, 7

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 2521 19
46 U.S.C. app. § 1702(14) 6
46 U.S.C. app. § 1706 3
46 U.S.C. app. § 1709 3
46 U.S.C. app. § 1709(d) 6
46 U.S.C. app. § 1710(a) 4, 5, 7, 18
46 U.S.C. app. § 1710(c) 4, 18
46 U.S.C. app. § 1710(h) 4
46 U.S.C. app. § 1712(a) 5, 6
46 U.S.C. app. § 1712(e) 6, 27
46 U.S.C. app. § 1713(a) 4
46 U.S.C. app. § 1713(c) 5, 6, 20, 24, 26
46 U.S.C. app. § 1713(d) 5, 6, 20, 24, 26
Reorganization Plan No. 7 of 1961, 75 Stat. 840 3

RULES & REGULATIONS

46 C.F.R. § 502.27 ..... 4, 15
46 C.F.R. §§ 502.51-502.56 ..... 4, 5, 17
46 C.F.R. § 502.56 4
46 C.F.R. § 502.67 ..... 5, 18
46 C.F.R. § 502.142 4
46 C.F.R. § 502.210(b) 5
46 C.F.R. § 502.223 ..... 4, 5, 7, 15
46 C.F.R. § 502.225 ..... 5, 15
46 C.F.R. § 502.226(a) 5, 16
46 C.F.R. § 502.227 ..... 5, 7
46 C.F.R. § 502.227(a)(6) 5, 15, 16, 17
46 C.F.R. § 502.281 4
46 C.F.R. § 502.282 4
Fed. R. Bankr. P. 19

TABLE OF AUTHORITIES—Continued

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Page(s)

1 Davis, Kenneth Culp & Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994) 13, 15
3 *Debates on the Federal Constitution* (Jonathan Elliot 2d ed. 1836) 22
Federalist No. 12 (Hamilton) 9, 10
Federalist No. 39 (Madison) 8, 9
Federalist No. 44 (Madison) 9
Federalist No. 64 (Jay) 9
Federalist No. 81 (Hamilton) 21, 22, 23
Pierce, Richard J., Jr., *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 Hastings L.J. 1 (1979) 13

AGENCY ORDERS

Motion of Respondent South Carolina State Ports Authority To Dismiss Complaint Granted, in *South Carolina Maritime Services, Inc. v. South Carolina State Ports Authority*, No. 99-21 (FMC Jan. 5, 2000) 7
Order Reversing the Administrative Law Judge's Order and Recommendation for Further Proceedings, in *South Carolina Maritime Services, Inc. v. South Carolina State Ports Authority*, No. 99-21 (FMC Mar. 23, 2000) 7, 25, 26

STATEMENT OF INTEREST OF AMICI

Amici are United States Senators, both of whom serve on the Senate Judiciary Committee. Amici file this brief because the court of appeals' decision in this case, if allowed to stand, could call into question a range of important statutes enacted by the Congress of the United States, including the Shipping Act of 1984. The rule announced by the court of appeals, in addition, could limit the ability of Congress in the future to adopt legislation that vests federal administrative agencies with the authority and flexibility they may need to enforce important federal regulatory programs against state instrumentalities.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

By any standard, one of the central attributes of sovereignty is the "'right to govern.'" *See Nevada v. Hall*, 440 U.S. 410, 416 (1979) (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793)). Although this case involves a state's claim of sovereign immunity, it is equally about the right of the United States to govern. Congress enacted the Shipping Act of 1984, applied that law to state instrumentalities, and directed that the Federal Maritime Commission (the "Commission") enforce the Act. The unprecedented decision of the court of appeals, however, if allowed to stand, would undermine Congress' ability to legislate and the Commission's ability to enforce federal law in an area that implicates Congress' well-settled and plenary authority to regulate interstate and foreign shipping. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *see also California v. United States*, 320 U.S. 577 (1944). It would do so, moreover, even

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[1] No part of this brief was drafted by any of the parties to this action, and no one other than the amici or their counsel have made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

though the federal regulatory process at issue neither threatens the states' separate and distinct status, *see, e.g.*, *Coyle v. Smith*, 221 U.S. 559 (1911), nor seeks to commandeer the states to enact or enforce federal law, *see New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997). Rather, as in *Reno v. Condon*, 528 U.S. 141 (2000), and *South Carolina v. Baker*, 485 U.S. 505 (1988), this case does not "seek to control or influence the manner in which States regulate private parties," *Baker*, 485 U.S. at 514-15.

In the court of appeals' view, an administrative proceeding brought before the Commission by a private party is sufficiently analogous to a private lawsuit that a state instrumentality may cloak itself in sovereign immunity and, on that basis, demand dismissal of the regulatory proceeding before the Commission. The approach adopted by the court of appeals fundamentally misconceives the role of the Commission, the function of the administrative proceeding at issue, and the constitutionally prescribed allocation of state and federal power. An administrative proceeding, whether commenced by private complaint or at the agency's own initiative, is not a private lawsuit. Rather, the proceeding is the process by which the Commission determines how *it* should discharge its obligation to enforce federal law.

This Court has recognized that the states retained their immunity against private suit when they joined the Union. It has also recognized, however, that the states surrendered their immunity with respect to actions taken by the national government within the sphere of its limited, but supreme authority. Because this case involves the power of the United States—and its power to enforce its laws—any coercion that may be present in this regulatory scheme is constitutionally permissible. To deny the Commission authority to proceed against the states is to deny the fundamental tenet of federalism that the broad sovereignty of the states ends at the

boundary of the federal government's "right to govern" in areas of federal concern.

BACKGROUND

A. The Statutory and Regulatory Framework.

The Shipping Act regulates an "essential part of interstate and foreign trade." *California*, 320 U.S. at 586. Congress passed the Act to protect the United States against international competition in the shipping industry, and, to further this goal, granted antitrust immunity to domestic shipping carriers and the maritime terminal operators that berth them. *See* 46 U.S.C. app. § 1706. Nonetheless, to prevent abuse of this immunity, the Act prohibits discriminatory practices by the regulated entities. *Id.* § 1709.[2]

The Federal Maritime Commission is the administrative agency empowered to administer and enforce the Shipping Act. The Commission is composed of five members appointed by the President with the advice and consent of the Senate.[3] As this Court described the Commission's prede-

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2 Congress originally passed the Shipping Act in 1916. In *California v. United States*, 320 U.S. 577, 585-86 (1944), this Court interpreted the Act and concluded that its definition of "person[s]" regulated by the Act covers states as well as private entities: "The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers;" the Court concluded that the Act leaves "no doubt that the legislation was designed to prevent discrimination no less by public than by private owners." *Id.* at 586. In 1984, Congress replaced the Act with the Shipping Act of 1984. The definition of "person[s]" covered by the 1984 Act tracks the language of the 1916 Act. In light of this settled history, the Ports Authority does not, and could not, argue that the Shipping Act does not apply to state instrumentalities.

3 The Commissioners are removable by the President for inefficiency, neglect of duty, or malfeasance in office. Reorganization Plan No. 7 of 1961, 75 Stat. 840, 840.

cessor agency, it is "the expert body established . . . for safeguarding this specialized aspect of the national interest." *California*, 320 U.S. at 584.

The Commission has a number of regulatory tools at its disposal to perform its "extensive regulatory duties," 46 C.F.R. § 502.281. In addition to adjudications of the type at issue in the present case, *id.* § 502.142, the Commission may conduct nonadjudicatory investigations when the Commission determines, in its discretion, "that information is required for the purposes of rulemaking or is necessary or helpful in the determination of its policies." *Id.* § 502.282. The Commission may also promulgate rules using notice-and-comment rulemaking, *id.* §§ 502.51-502.56; *see also* 5 U.S.C. § 553, and so-called "negotiated rulemaking," 46 C.F.R. § 502.56 ("The Commission, either upon petition of interested persons or upon its own motion, may establish a negotiated rulemaking committee to negotiate and develop consensus on a proposed rule, if . . . use of such a committee is determined by the Commission to be in the public interest.").

Under the Act, potential violations of the nondiscrimination provision may be brought to the Commission's attention by a private party, 46 U.S.C. app. § 1710(a), or upon its own motion, *id.* §§ 1710(c), 1713(a).[4] In either case, the statute requires that the Commission provide the "opportunity" for some type of hearing. *Id.* § 1713(a).

The Commission has determined, pursuant to its delegated authority, that the initial assessment of any violation should be made by an administrative law judge ("ALJ"). 46 C.F.R. § 502.223. In a hearing before the ALJ, non-lawyers are permitted to represent parties. *Id.* § 502.27 (permitting a

[4] The Act also permits the United States or the complainant to seek an injunction in federal court. 46 U.S.C. app. § 1710(h).

"person who is not an attorney at law" to practice before the Commission if certain criteria are met). The ALJ does not have any independent enforcement power. *See id.* § 502.210(b). After the conclusion of the hearing, the ALJ makes an "initial or recommended decision[]." *Id.* § 502.223.

Any party may seek the Commission's review of the ALJ's decision, or (as here) the Commission may review the decision on its own motion. *See id.* § 502.227. On such review, the Commission may take notice of "technical or scientific facts within the general knowledge of the Commission as an expert body." *Id.* § 502.226(a). Moreover, the Commission has the option of limiting the relevant issues through rulemaking. *See id.* § 502.227(a)(6); *see also id.* §§ 502.51-502.56. Finally, the Commission may decide, through rulemaking or by adjudicatory order in a particular case, to exempt a "class of agreements . . . or [a] specified activity . . . from any requirement of the Shipping Act" if it determines that the exemption "will not result in substantial reduction in competition or be detrimental to commerce." *Id.* § 502.67.

If the Commission finds a violation, it may issue a cease and desist order, order reparations to be paid to the injured party, or assess civil penalties payable to the United States. 46 U.S.C. app. §§ 1710(a), 1712(a), 1713(c). The Commission does not possess independent coercive power to enforce its orders. *See id.* § 1713(c). The Commission's decision constitutes the "final decision[]" of the agency. 46 C.F.R. § 502.225.

If the regulated party does not comply with the order, the statute provides enforcement mechanisms. If the Commission orders reparations to be paid to a private party, the statute provides that "the person to whom the award was made may seek enforcement of the order in a United States district court having jurisdiction [over] the parties." 46 U.S.C. app. § 1713(d). An injured private party may also seek to enforce a nonreparation order in court. *Id.* § 1713(c).

Alternatively, the statute provides an enforcement mechanism for the United States. Although the Commission itself does not have independent enforcement authority, the Attorney General may file an enforcement action on behalf of the United States in a federal district court. *See id.* ("In case of violation of an order of the Commission, . . . the Attorney General . . . may seek enforcement by a United States district court having jurisdiction over the parties."). The Commission may also induce compliance—both throughout the proceedings and with the final order—by assessing civil penalties for violations of regulations or of a Commission order. *Id.* § 1712(a). The Commission does not have independent authority to enforce these penalty provisions, but, as with the final order, may request that the Attorney General bring an enforcement action. *Id.* § 1712(e). Any civil penalties are payable to the "United States." *Id.* § 1712(a).

If a party disagrees with a Commission order, it has two options. First, it may choose to defend in any enforcement action. *See id.* § 1713(c)-(d). Alternatively, the regulated party may file a petition for review of the agency's action, in the court of appeals, under the Hobbs Act. 28 U.S.C. § 2341 *et seq*. In such an action, "[t]he action shall be against the United States." *Id.* § 2344.

B. The Present Case.

The South Carolina State Ports Authority ("Ports Authority") is a "maritime terminal operator" covered by the Shipping Act of 1984, *see* 46 U.S.C. app. § 1702(14), and is therefore subject to the Act's nondiscrimination provision, *id.* § 1709(d). A private company, South Carolina Maritime Services, Inc. ("Maritime Services"), objected that the Ports Authority had violated the nondiscrimination provision by refusing it berthing space while granting berthing space to another company that Maritime Services believed to be similarly situated. Availing itself of the procedural mechanism to bring the alleged violation to the Commission's attention,

Maritime Services filed an administrative complaint against the Ports Authority. *See id.* § 1710(a).

Following the procedures that the Commission has established by regulation, an ALJ was assigned to hold a hearing and to provide a recommended decision to the Commission. *See* 46 C.F.R. § 502.223. In this hearing, the Ports Authority asserted, *inter alia*, that because it had been deemed an arm of the State under Fourth Circuit precedent, *see Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051 (4th Cir. 1995), it was entitled to invoke the sovereign immunity of the State as a complete defense in the Commission's proceedings. The ALJ agreed and, on that basis, dismissed the proceeding. Pet. App. 59a-60a.

Although neither party appealed, the Commission decided to hear the matter on its own motion. *See* 46 C.F.R. § 502.227. The Commission rejected the notion that an administrative proceeding initiated by a private party is similar to a lawsuit and that sovereign immunity should thus apply. Rather, the Commission stated, both "Commission investigations, and private complaint proceedings, are part of a unified system of regulation." Pet. App. 34a. Whether the proceeding is initiated by a private complaint or on the Commission's own motion (including after investigating at the instance of a private party), the Commission held, they are both part of a "unitary . . . regulatory scheme" in which "all . . . determinations as to whether the Act has been violated . . . are made by the Commission." Pet. App. 34a-35a (citation omitted).

The Ports Authority then filed a petition for review in the court of appeals under the Hobbs Act. As required by the Hobbs Act, the United States and the Commission were respondents in the action. *See* 28 U.S.C. § 2344. The initial complaining party, Maritime Services, was not named in the petition and is not a party before this Court.

The Court of Appeals for the Fourth Circuit granted the Ports Authority's petition for review. *South Carolina State Ports Auth. v. FMC*, 243 F.3d 165 (4th Cir. 2001). The court of appeals held that this Court's cases involving the immunity of the states from private lawsuits in federal and state courts apply with equal force to adjudicatory proceedings before an administrative agency. *See id.* at 169.[5] To reach this conclusion, the court of appeals equated an adjudicatory administrative proceeding initiated by a private party before the Commission with a suit in court, stating that, in its view, the proceeding before the Commission "walks, talks, and squawks" like a lawsuit. *Id.* at 174. The Fourth Circuit held that because this case involved an "adjudication," sovereign immunity must apply. *Id.*

ARGUMENT

I. STATES HAVE NO SOVEREIGN IMMUNITY AS AGAINST THE UNITED STATES.

Our government is founded on a system of dual sovereignty. Each government—both state and federal—is sovereign and distinct within its sphere. *See* Federalist No. 39 (Madison) ("[The states] form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere."). The states did not forfeit this sovereignty by ratifying the Constitution,

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5 For example, the Fourth Circuit stated:

> [The Supreme] Court noted [in *Alden*] the "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution . . . ." This language, referring to "proceedings or suits," makes it clear that certain proceedings, while not suits, are nevertheless barred by the doctrine of sovereign immunity.

243 F.3d at 170 (internal quotations and citation omitted).

but, rather, retain "a residuary and inviolable sovereignty." *Id.* This Court has held that, as part of this residual sovereignty, states possess sovereign immunity, according them "the respect owed them as members of the federation." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993); *see also Alden v. Maine*, 527 U.S. 706, 715 (1999) (sovereign immunity "central to [states'] sovereign dignity").

At the same time, however, the states did surrender a portion of their sovereignty to the national government. This notion is reflected in the Supremacy Clause, and in the very structure of our federal system. U.S. Const. art. VI. The states, for example, relinquished to the federal government the plenary authority to regulate interstate and foreign commerce. As this Court recognized in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824), this power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Indeed, the need for a central government to regulate commerce, without interference from the states or foreign nations, was "one of the reasons for adopting the Constitution." *United States* v. *Locke*, 529 U.S. 89, 99 (2000); *see also* Federalist Nos. 12 (Hamilton), 44 (Madison), 64 (Jay).

The federal power to regulate the activity of the states in maritime commerce is uncontroverted in the present case. As this Court stated in the context of the Shipping Act of 1916: "[I]t is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies." *California v. United States*, 320 U.S. 577, 586 (1944) (citation omitted). Indeed, even where members of this Court have expressed doubt regarding the power of the federal government to regulate the states, no doubt was expressed regarding the federal

government's constitutional authority to regulate navigation. *EEOC v. Wyoming*, 460 U.S. 226, 269 n.5 (1983) (Powell, J., dissenting, joined by O'Connor, J.) ("[I]t is part of the power to regulate interstate navigation that lies within the very core of the Commerce Clause. I certainly do not suggest that principles of federalism should prevent Congress from regulating navigation.").

By granting the federal government plenary authority to regulate in defined areas, the states necessarily relinquished part of their sovereign immunity under the "plan of the [Constitutional] convention." Federalist No. 81 (Hamilton); *see also Alden*, 527 U.S. at 755 ("[C]ertain limits are implicit in the constitutional principle of state sovereign immunity."); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934). Most significantly, "[i]n ratifying the Constitution, the States consented to suits brought by . . . the Federal Government," *Alden*, 527 U.S. at 755 (citation omitted), and thus "States have no sovereign immunity as against the Federal Government." *West Virginia v. United States*, 479 U.S. 305, 311 (1987); *see also United States v. Mississippi*, 380 U.S. 128, 140 (1965) ("[N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States."). For this reason, the Court has consistently recognized that the federal government may bring suit against a state in federal court to obtain compliance with federal law. *See, e.g., Alden*, 527 U.S. at 755-56, 759-60; *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996). Such power, the Court has held, is not only "inherent in the constitutional plan," *Principality of Monaco*, 292 U.S. at 329 (citations omitted), but is also necessary to the "permanence of

the Union," *United States v. Texas*, 143 U.S. 621, 644-45 (1892).[6]

Where the federal government has the power to regulate the activity of the states, it also has the power to enforce its laws against the states—either through direct enforcement or by otherwise inducing compliance with its regulatory scheme. "Any federal regulation demands compliance," even by the states. *South Carolina v. Baker*, 485 U.S. 505, 515 (1988). In *Reno v. Condon*, 528 U.S. 141 (2000), for example, the Court upheld a "regulatory scheme" in which federal law prohibited states from disclosing personal information in department of motor vehicle records. The Court expressly noted that the provisions at issue were enforceable, in part, by a regulatory process under which the United States Attorney General could impose substantial fines on the states for non-compliance. *Id.* at 146-47. The state objected that these penalty provisions had the effect of coercing the state,

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6 Other limits on states' sovereign immunity were "in the plan of the convention." *See* Federalist No. 81 (Hamilton). In ratifying the Constitution, states also consented to suit by other states:

> [A] suit by one State against another State . . . involve[s] a distinct and essential principle of the constitutional plan which provides means for the judicial settlement of controversies between States of the Union, a principle which necessarily operates regardless of the consent of the defendant State. . . . [This waiving of sovereign immunity] was essential to the peace of the Union. The Federalist, No. 80; Story on the Constitution § 1679. With respect to such controversies, the States by the adoption of the Constitution, acting in their highest sovereign capacity, in the convention of the people, waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established by their own consent and delegated authority as a necessary feature of the formation of a more perfect Union.

Principality of Monaco, 292 U.S. at 328-29 (internal quotations and citations omitted).

noting that the statute's "penalty provisions hang over the States as a potential punishment should they fail to comply with the Act." *Id.* at 150. The Court observed that such a threat is "an inevitable consequence of regulating a state activity." *Id.* (internal quotations and citation omitted). In short, since "[a]ny federal regulation demands compliance," the federal government may coerce states in order to encourage such compliance. *Id.* (internal quotations and citation omitted).

It is against this background of the power of the federal government to take appropriate enforcement action against the states, in spheres committed to federal authority, that the Court should assess the constitutionality of Commission adjudications of violations of the Shipping Act.

II. AN AGENCY PROCEEDING IS THE PROCESS BY WHICH THE EXECUTIVE DECIDES HOW IT WILL ENFORCE FEDERAL LAW.

The court of appeals held that the reasoning of this Court's precedents involving the immunity of the states from private lawsuits in federal and state courts applies with equal force to adjudicatory proceedings initiated by a private party before an administrative agency. *See* 243 F.3d at 169. To reach this conclusion, the court of appeals equated the adjudicatory administrative proceeding before the Commission with a private suit in court, stating that, in its view, the proceeding before the Commission "walks, talks, and squawks" like a lawsuit. *Id.* at 174. In the court's view, the "placement [of the proceeding] within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication," *id.*, and, for this reason, sovereign immunity applies.

The Fourth Circuit's reasoning, however, fundamentally misconceives the administrative process. The Commission's adjudicatory process is the means by which it gather facts, assesses competing law and policy considerations, and determines what position *it* will take in enforcing federal law.

While that process is informed by a privately initiated proceeding before an administrative law judge, it is fundamentally different from a lawsuit.

Agencies can go about deciding what position to take in the enforcement of the law in various ways: they can engage in notice-and-comment rulemaking, adjudications, negotiated rulemaking, informal agency action, and various permutations of each of these. 5 U.S.C. §§ 553-558; *see generally* 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* 225-401 (3d ed. 1994). There are many reasons why an agency might choose one form over another. For example, "the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule." *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) ("*Chenery II*"). Moreover, a decision about which means to use entails a political judgment by an agency about how it should allocate its limited resources to address a wide array of issues. *See* 1 Davis & Pierce, *Administrative Law Treatise* 280; *see also id.* at 365 ("It is not uncommon for a single rulemaking to require a decade and commitment of 10 percent of an agency's total staff and resources."); Richard J. Pierce, Jr., *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 Hastings L.J. 1 (1979). In each instance, however, the agency is doing the same thing: It is determining what position the national government should take in enforcing the law. *See Chenery II*, 332 U.S. at 200-03.

The Court's *Chevron* jurisprudence also recognizes that rulemakings and adjudications are merely different means by which an agency makes these policy decisions. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Court held that courts should defer to an agency's interpretation of a statute, so long

as it is reasonable, because the resolution of such a question involves a policy judgment that Congress left to the agency. *Id.* at 842-43. As the Court stated: "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy . . . to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843 (internal quotations and citation omitted) (first alteration in original). Although *Chevron* itself involved a notice-and-comment rulemaking, this Court has repeatedly applied *Chevron* deference to policy made through adjudications as well. *E.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 423-25 (1999); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 389-99 (1996); *Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 644-45 (1990). This deference to both adjudications and rulemakings is required because each represents the agency's determination of a policy issue delegated to it by Congress. *See also United States v. Mead Corp.*, 533 U.S. 218, ___, 121 S. Ct. 2164, 2171 (2001) ("Delegation of such [policy making] authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking . . . .").

The functional equivalence of rulemaking and adjudication as a means to execute the law is central to administrative law. *See Chenery II*, 332 U.S. at 200-03. Moreover, the Court has steadfastly declined to dictate one method of decisional process (rulemaking) over another (adjudication): "In performing its important functions . . . , an administrative agency must be equipped to act either by general rule or by individual order." *Id.* at 202. To interfere with the agency's process, the Court has held, would "stultify the administrative process," making the process "inflexible and incapable of dealing with many of the specialized problems which arise." *Id.* (citation omitted). The Court reaffirmed this holding in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974) ("[T]he choice between rulemaking and adjudication lies . . . within the [agency's] discretion."). Moreover,

since *Bell Aerospace*, this Court "has not even suggested that a court can constrain an agency's choice between rulemaking and adjudication." 1 Davis & Pierce, *Administrative Law Treatise* 273. As the Court held in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25 (1978), courts should not "intrude[] into the agency's decision making process," but should leave the decision making process to the "discretion of the agencies to which Congress has confided the responsibility for substantive judgments." *See also id.* at 545 (dictating additional procedures "'propel[s] the court into the domain which Congress has set aside exclusively for the administrative agency'") (quoting *Chenery II*, 332 U.S. at 196); *see also Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 653-56 (1990) (applying *Vermont Yankee* to adjudications).

When the Commission in this case commenced a proceeding against the Ports Authority on the basis of a complaint by a private party, it was engaged in the sort of adjudicative lawmaking that is central to administrative law. The Commission, as "the expert body established . . . for safeguarding this specialized aspect of the national interest," *California*, 320 U.S. at 584, is responsible for the "final decision" of the agency, 46 C.F.R. § 502.225. To this end, the agency has established a procedure by which a recommended decision is made by an administrative law judge after conducting a hearing. *Id.* § 502.223 ("To the administrative law judges is delegated the authority to make and serve initial or recommended decisions."). In such proceedings, non-lawyers are permitted to appear. *Id.* § 502.27. Although the ALJ makes an initial determination, "[t]he ALJ's decision is no more than a recommendation that the Commission is free to reject." *Petchem, Inc. v. FMC*, 853 F.2d 958, 962 (D.C. Cir. 1988).

After receiving the recommendation of the ALJ, the Commission is then free to reach whatever determination it deems appropriate. *See* 46 C.F.R. § 502.227(a)(6). Because

it is the Commission that makes the final policy judgment for the agency, the Commission may—as in this case—review the decision of an ALJ even when neither party appeals the case. *See id.*[7] Moreover, in making this final decision for the agency, the Commission may take notice of "technical or scientific facts within the general knowledge of the Commission as an expert body." *Id.* § 502.226(a).

Unlike a case before a court, neither the ALJ nor the Commission has independent enforcement power or independent contempt power: the United States must go to court to compel action of any sort. Moreover, a reviewing court can only review the decision "[on] the grounds" provided by the agency, as a contrary rule would "propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Chenery II*, 332 U.S. at 196 (summarizing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) ("*Chenery I*")).[8] In this case, the private party that brought the initial complaint declined to seek review of the ALJ's order of dismissal before the Commission; significantly, it is the Commission that reached out to continue to pursue the proceeding, and it is the Commission that is the petitioner in this Court.

The court of appeals' focus on certain procedural similarities between the agency process and a private lawsuit overlooked the more important functional equivalence of no-

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7 Needless to say, the Commission's ability to decide an issue even when no party has "appealed" contrasts with the role of a federal court. A court can only hear "cases," and therefore does not have the power to act without an aggrieved party. The Commission, by contrast, is setting the policy for the Executive branch and, therefore, has the right—and duty—to act even when no party seeks review.

8 *Chenery I*, of course, stands in contrast to the rule this Court and federal appellate courts apply in reviewing the decisions of lower courts. This Court and the courts of appeals may affirm a decision on alternate grounds. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 166 (1997).

tice-and-comment rulemaking and agency adjudication. The mere fact that an agency proceeds by means of adjudication does not convert the matter from agency action into a lawsuit: "It is no doubt true that [agencies] 'adjudicate,' *i.e.*, they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing 'inherently judicial' about 'adjudication;'" rather, adjudications by agencies involve "individuals exercising *executive* rather than *judicial* power (in the constitutional sense)." *Freytag v. Commissioner*, 501 U.S. 868, 908-09 (1991) (Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., concurring in the judgment) (emphasis in original).

Nor does the fact that this case may have required the resolution of factual issues mean that the Commission proceeding must be equated with a private lawsuit. Agencies necessarily resolve factual issues in a broad array of settings in the process of executing the law. Indeed, as this Court has recognized, it may even decide such issues through notice-and-comment rulemakings. In *Heckler v. Campbell*, 461 U.S. 458 (1983), for example, the Social Security Administration developed a "matrix" to decide whether an applicant's particular factual scenario would constitute a "disability" within the meaning of the Social Security Act—a factual assessment that had previously been determined through hearings. *Id.* at 461-62. The Court upheld the agency's approach, concluding that an agency may "rely[] on rulemaking to resolve certain classes of issues," "even where an agency's enabling statute expressly requires it to hold a hearing." *Id.* at 467.

Similarly, the regulatory scheme at issue here permits the Commission to limit the issues decided by engaging in notice-and-comment rulemaking to narrow the range of issues. *See* 46 C.F.R. § 502.227(a)(6); *see also id.* §§ 502.51-502.56. Moreover, pursuant to its delegated authority to administer and enforce the law, the agency may also decide, by "order or rule," to exempt a "class of agreements . . . or [a]

specified activity . . . from any requirement of the Shipping Act," so long as it determines that the exemption "will not result in substantial reduction in competition or be detrimental to commerce." *Id.* § 502.67.

That a Commission proceeding may be initiated by the filing of a complaint by a private party, 46 U.S.C. app. § 1710(a), as well as at the Commission's own initiative, *id.* § 1710(c), does not transform the agency proceeding into the equivalent of a private lawsuit.[9] As Justice Jackson observed for the Court in *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950), although there have been times "especially early in the history of the federal administrative tribunal" where "courts were persuaded to engraft judicial limitations upon the administrative process," judicial and administrative powers are distinct concepts. In particular, "an administrative agency charged with seeing that the laws are enforced may . . . have and exercise the powers of original inquiry" and "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Id.* at 642-43. Surely, the Commission's power to investigate—to assure itself that the law is not being violated—extends far enough to permit the Commission to conduct proceedings, not only when it has itself uncovered evidence of a violation of law, but when a private party brings alleged wrongdoing to its attention. This process of "inform[ing] itself as to whether there is [a] probable violation of the law," *id.*, does not alter the fact that the Commission is engaged in law enforcement and not the sort of adjudication of claims that characterizes the judicial system.

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9 It is certainly reasonable for Congress to have concluded that this statutory structure constitutes an appropriate way to bring potential violations of law to the Executive's attention, so the Executive Branch can then decide what action it should take.

Finally, and for similar reasons, an administrative proceeding before the Commission is unlike an adjudication before an Article I court such as the Court of Federal Claims or a bankruptcy court. Unlike the Commission, those entities have not been delegated, and do not exercise, any authority to make policy on behalf of the Executive Branch. *See Chevron*, 467 U.S. at 843-44. Similarly, neither the Court of Federal Claims nor a bankruptcy court can be said to be engaged in the *enforcement*, as opposed to the neutral *application*, of the law. The Commission conducts adjudications to determine what position the United States should take in enforcing the law. In sharp contrast, these Article I courts act as neutral arbiters and possess independent coercive powers, *see* 28 U.S.C. § 2521; Fed. R. Bankr. P. 9020. *See also Freytag*, 501 U.S. at 891 (Tax Court exercises "judicial power" because "[i]t is neither an advocate nor rulemaker. . . . [I]t construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service."). Unlike Commission proceedings, moreover, appeals from the decisions of the Court of Federal Claims and the bankruptcy courts are not, as a matter of course, brought against the United States, and the determinations of these Article I courts are not enforced through actions brought by the Attorney General.

Thus, even though some analogies may be drawn between an administrative proceeding before the Commission and a lawsuit, the two are fundamentally different: an administrative proceeding before the Commission constitutes an action by the federal government to decide the position of the United States in enforcing federal law, while a lawsuit involves the final and enforceable resolution of a discrete case or controversy by a disinterested referee with no independent duty to investigate and enforce the law.

III. A STATE DOES NOT HAVE IMMUNITY IN A COMMISSION PROCEEDING AS ANY COMPULSION RESULTS FROM THE ACTION OF THE UNITED STATES.

This Court has long recognized that sovereign immunity protects the states from the requirement that they defend lawsuits as a result of private compulsion. Here, the Ports Authority's argument fails, not only because a Commission proceeding is not a lawsuit, but also because no private party may compel a marine terminal operator to appear and defend itself before the Commission. As a result, the sort of private compulsion that forms the essential touchstone of sovereign immunity doctrine is not present here.

In a proceeding before the Commission, whether initiated by a private party or the Commission, the Commission lacks independent enforcement power. As the court of appeals observed, "under the Act, a state may choose to ignore a subpoena, an order, or a judgment." 243 F.3d at 175. Rather, the direct, coercive force of the law is not implicated until either the Attorney General, in his discretion, brings an action to enforce the Commission's order or a private party brings an action seeking to enforce an order in federal district court. *See* 46 U.S.C. app. § 1713(c)-(d). There is no question, however, that the United States may maintain a suit against a state instrumentality, and that the "States have no sovereign immunity as against the Federal Government." *West Virginia v. United States*, 479 U.S. at 311. A claim brought by a private party to enforce a reparation or other order, in contrast, would likely be met with the state's assertion of a sovereign immunity defense. To the extent such a defense has merit, the state could readily avoid suit, and would suffer no coercion at the hand of a private party.

Finally, it is possible that a state instrumentality might, at the administrative stage, feel the indirect pressure of the threat of a later enforcement action that the Attorney General might bring. Any such coercion, however, is the product of a

constitutional structure that permits the United States to enforce neutral regulations against state instrumentalities, and that permits the United States to bring suit against state instrumentalities to obtain compliance. In short, any such coercion is the product of federal action—or the threat of federal action—and not the sort of private action that implicates sovereign immunity.

A. Sovereign Immunity Protects a State From Coercion by a Private Party.

In Federalist No. 81, in a passage repeatedly quoted by this Court, *see, e.g.*, *Alden*, 527 U.S. at 716-17, Alexander Hamilton laid out the general principle that states are immune from suits by private parties: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." Federalist No. 81 (Hamilton) (emphasis omitted). Hamilton continued, giving further content to this general statement, and linked sovereign immunity to a state's protection from compulsion by a private party:

> The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced?

Id.[10]

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[10] Some of the statements of the Founders could be construed (as the court of appeals seems to have concluded) to support the thesis that sovereign immunity protects states not only from coercion by a private party, but also from the mere fact of being *asked* to appear. At the Virginia

Similarly, in his dissenting opinion in *Chisholm v. Georgia*, Justice Iredell tied sovereign immunity to protection of a sovereign against compulsion by an individual: "my present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money." 2 U.S. (2 Dall.) at 449-50. Justice Iredell went on to note that the citizen's recourse is to the conscience of the sovereign: "The remedy, in the language of Blackstone, being a matter of grace, and not on compulsion." *Id.* at 444; *see also id.* at 442 ("'If any person has, in point of property, a just demand upon the King, he must petition him in his Court of Chancery, where his Chancellor will administer right, as a matter of grace, though not upon compulsion.'") (quoting Blackstone). Translating this from the context of the King to that of the states, Justice Iredell stated: "public faith alone is the ground of relief, and the Legislative body the only one that can afford a remedy, which from the very nature of it must be the effect of its discretion and not of any compulsory process." *Id.* at 446.

Since Justice Iredell's famous dissent, this Court has repeatedly tied sovereign immunity to protecting the states

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ratifying convention, for example, John Marshall stated: "I hope that no gentleman will think that a state will be called at the bar of the federal court." 3 *Debates on the Federal Constitution* 555 (Jonathan Elliot 2d ed. 1836). Nonetheless, two sentences later, Marshall explicitly linked the indignity to coercion: "It is not rational to suppose that the sovereign power should be *dragged* before a court." *Id.* (emphasis added). Other statements by the Founders are best seen as conclusory statements that states are immune from private suits. *See, e.g., id.* at 533 (Madison) ("It is not in the power of individuals to call any state into court . . . . [I]f a state should condescend to be a party, this court may take cognizance of it."). The Founders' concern about coercion is not surprising, in light of the hefty war debt of many of the states, and the concern of many of the Founders that states not be compelled to pay these debts. *See, e.g.*, Federalist No. 81 (Hamilton); *see also Alden*, 527 U.S. at 716; *Nevada v. Hall*, 440 U.S. 410, 418 (1979).

from coercion by a private party (or foreign state or Indian tribe). *See, e.g., Alden*, 527 U.S. at 717 ("'The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force.'") (quoting Federalist No. 81); *Seminole Tribe*, 517 U.S. at 75 (refusing to subject state official "to the full remedial powers of a federal court, including, presumably, contempt sanctions" in a private suit); *In re Ayers*, 123 U.S. 443, 505 (1887) (private suits against states present "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties"); *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (a state "cannot be compelled by suit [by an individual] to perform its contracts"). Where there is no such coercion, a state's sovereign immunity is not implicated.

B. Private Parties and the Commission Do Not Have Independent Coercive Powers and Any Coercion in the Regulatory Scheme Is the Power of the United States.

Under this principle, the court of appeals erred in directing that the Commission dismiss the administrative proceeding brought against respondent. Neither the private party nor the Commission has any independent coercive power in the proceeding. As a result, any coercive effect on the Ports Authority must be the product of (1) the risk of stigma the Ports Authority may experience by failing to comply with federal administrative rules and orders; (2) the possibility that a private party might bring an action to enforce an order of reparation or other order entered by the Commission; or (3) the possibility that the Attorney General might someday bring an enforcement action. None of these potential sources of coercion, however, supports the court of appeals' decision.

1. Stigmatic Harm

In an administrative proceeding initiated by a private party, the state cannot be "compelled" by the party or the

Commission to do anything. As the court of appeals recognized: "[U]nder the Act, a state may choose to ignore a subpoena, an order, or a judgment." 243 F.3d at 175 (citation omitted).

The court of appeals recognized the lack of enforcement power, but noted that the state would suffer an unacceptable "stigma" if it chose not to answer to the administrative proceedings: "[A] judgment or a subpoena against a state is a powerful thing, if not legally, then certainly *politically*. All parties, and certainly political entities such as states, have an interest in avoiding the *stigma* that attaches even to an unenforceable default judgment." *Id.* (emphasis added). Yet the possible "stigma" that the Fourth Circuit objects to is nothing more than the political accountability that principles of federalism require that a state bear. *See Alden*, 527 U.S. at 775-52; *Hans*, 134 U.S. at 21 ("The legislative department of a state represents its polity and its will, and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule . . . never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself."); *Chisholm*, 2 U.S. (2 Dall.) at 446 (Iredell, J., dissenting) (if a state legislature fails to provide a remedy for its citizens, it must incur "whatever reproach" its citizens deem appropriate); *cf. New York v. United States*, 505 U.S. 144, 168 (1992). Thus, the court of appeals got it backwards: the state might ignore the administrative proceeding, but must be willing to accept "whatever reproach the [state] may incur." *Chisholm*, 2 U.S. (2 Dall.) at 446 (Iredell, J., dissenting).

2. *Enforcement Action by Private Party*

Similarly, the possibility that a private party might someday bring an action in federal district court seeking to enforce a reparation or other order against a state instrumentality, *see* 46 U.S.C. app. § 1713(c)-(d), does not support the court of appeals' decision. In such an action, it is likely that

a state would assert sovereign immunity. To the extent that a court treats a privately initiated action to enforce a reparation or other order as a private suit against the state, it is likely that the court would sustain the defense.[11] In this instance, the state instrumentality could not and would not be coerced: it would be free to participate in the district court litigation and to accept any judgment the court might enter, or it would be free to assert its immunity and to leave the private plaintiff without a judicial remedy.

But the fact that a state instrumentality might assert sovereign immunity as a defense to an action to enforce a reparation order does not deprive the Commission of the authority to determine whether reparations are due. As the Commission stated in this case:

> [E]ven if a court were to rule that a Commission reparations award is unenforceable, the issuance of an order finding violations of the Shipping Act is not futile. The Commission must be able to determine whether the actions of regulated entities like [the Ports Authority] violate the Shipping Act. Whether or not a complainant is able to collect on a reparations award is a separate issue, distinct from the Commission's obligation to pass judgment on the legality of allegedly unreasonable or otherwise prohibited actions.

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[11] The Court need not, and should not, decide here whether sovereign immunity is available as a defense in a private enforcement proceeding. *Compare* Pet. App. 35a-37a (Commission argues that a state would not have sovereign immunity in such an action) *with* Brief for the United States in Opposition at 9 n.2 (Solicitor General takes position that states would have immunity in a private enforcement proceeding). If, as the Solicitor General asserts, states have sovereign immunity in such a proceeding, the states would not suffer any coercion as they could assert this immunity; if the Commission is correct, any coercion present would be constitutionally permissible.

Pet. App. 37a.[12] Moreover, sovereign immunity is a discretionary defense, which a state may assert or may forgo. Rather than face public "reproach," the state might well elect to defend its actions either before the court of appeals, under the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, or before the district court in an enforcement action, 46 U.S.C. app. § 1713(c)-(d).

3. Enforcement Action by the United States

If private enforcement were all that was at stake, and if a state were entitled to assert sovereign immunity in such an action, a state might default in the Commission proceeding with little concern: the state could avoid any enforceable judgment and would merely need to assess the political cost of non-compliance. Under the statutory scheme, however, the United States has a duty to enforce the law, including by going to federal district court to seek an enforceable judgment in appropriate cases. The Act specifies that the United States, through the Attorney General, "may seek enforcement [of a nonreparation order] by a United States district court having jurisdiction over the parties." 46 U.S.C. app.

12 Furthermore, a Commission order determining that a state has violated the law—even if that order is unenforceable—is important to ensure that a state is accountable to its citizens. This Court has repeatedly noted that a state must be politically accountable to its citizens for any failure to comply with federal law, and that such accountability is critical to the workings of federalism. *Alden*, 527 U.S. at 775-52; *Hans*, 134 U.S. at 21; *Chisholm*, 2 U.S. (2 Dall.) at 448 (Iredell, J., dissenting); *cf. New York*, 505 U.S. at 168. In the context of administrative law, however, the substantive requirements of law are not always based on preexisting norms, but at times depend on the administrative agency choosing one policy from the range of permissible policy choices. *See Chevron*, 467 U.S. at 842-43. In other words, the substantive requirements of law are often not decided until the completion of the administrative process—i.e., until after the Executive has decided and articulated its policy through its agency. Thus, the administrative order is necessary to permit citizens to hold a state politically accountable for any decision to fail to comply with federal law and, therefore, is necessary to the workings of federalism. *See Alden*, 527 U.S. at 775-52; *New York*, 505 U.S. at 168.

§ 1713(c). Similarly, the Attorney General may seek enforcement of an order assessing civil penalties "in an appropriate district court of the United States." *Id.* § 1712(e). But such action by the United States does not give rise to sovereign immunity concerns; it is well settled that states do not have sovereign immunity as to suits by the federal government. *Compare Alden*, 527 U.S. at 755-56, 759-60 and *Seminole Tribe*, 517 U.S. at 71 n.14 *with West Virginia v. United States*, 479 U.S. at 311 and *United States v. Texas*, 143 U.S. at 645; *see also FMC v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975) (stating, in the context of a proceeding involving a state instrumentality, "[i]t is beyond cavil that the very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate the activities of the entities over which it has jurisdiction and the right under the appropriate conditions to have district courts enforce its [actions]").

It is true that states may feel some pressure—or effective coercion—to participate in the administrative process based on the *threat* that the United States may someday bring an enforcement action. Such indirect coercion, however, is entirely consistent with the federal structure and the constitutional allocation of state and federal power. Any such coercion is intimately intertwined with the United States's "right to govern." *Hall*, 440 U.S. at 416.

Where the federal government has the power to regulate the states, it also has the power to enforce its laws against the states—either through direct enforcement or by inducing compliance with its regulatory scheme. Even in those areas in which members of the Court have expressed doubts about the federal government's power to regulate states, *see, e.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557-79 (1985) (Powell, J., dissenting); *EEOC v. Wyoming*, 460 U.S. at 265-75 (Powell, J., dissenting), no Justice has ever suggested that the United States is limited in taking en-

forcement action where the substantive power exists. Thus, although members of the Court doubted whether the federal government could regulate age discrimination involving state employees, *EEOC v. Wyoming*, 460 U.S. at 265-75 (Powell, J., dissenting), or the wages paid to those employees, *Garcia*, 469 U.S. at 557-79 (Powell, J., dissenting), it has never been suggested that, once that power was found, the United States could be denied the ability to enforce the law. *See Alden*, 527 U.S. at 759 (suggesting that any federal interest could have been protected by sending an attorney for the United States to Maine to enforce wage-and-hour laws). If the federal government has the power to regulate the activity of the states—as it does here—it necessarily has the power to induce compliance. The power to regulate, without the power to induce compliance, is no power at all.

Just two Terms ago, this Court upheld, over constitutional challenge, a federal law that regulated the states and induced compliance through a federal administrative mechanism. In *Reno v. Condon*, the state objected that the penalty provisions of the scheme coerced it to comply, noting that the statute's "penalty provisions hang over the States as a potential punishment should they fail to comply with the Act." 528 U.S. at 150. The Court rejected this challenge on the ground that any such coercion is "an inevitable consequence of regulating a state activity." *Id.* (internal quotations and citation omitted). As the Court noted: "Any federal regulation demands compliance," and this pressure assures compliance. *Id.* (internal quotations and citation omitted).

In sum, whether the federal power is understood as applying at the hearing stage or at the enforcement stage, it is the federal government that is acting, and thus the federal government's "right to govern" that is at stake. *Hall*, 440 U.S. at 416. Accordingly, sovereign immunity does not apply in these proceedings. *See West Virginia v. United States*, 479 U.S. at 311; *United States v. Texas*, 143 U.S. at 645.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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24 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
CONCLUSION	20

TABLE OF AUTHORITIES

CASE	Page
Alden v. Maine, 527 U.S. 706 (1999)	8, 10, 11, 13
In re Ayers, 123 U.S. 443 (1887)	8, 10
Board of Trustees of University Of Ala. v. Garrett, 531 U.S. 356 (2001)	18
Bowsher v. Synar, 478 U.S. 714 (1986)	13
Buckley v. Valeo, 424 U.S. 1 (1976)	13
California v. United States, 320 U.S. 577 (1944)	1-2
College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Board, 527 U.S. 666 (1999)	18
Florida Prepaid Postsecondary Ed. Expense Board v. College Savings Bank, 527 U.S. 627 (1999)	18
Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991)	14, 15, 16
Great Northern Life Insurance v. Read, 322 U.S. 47 (1944)	9
Hans v. Louisiana, 134 U.S.1 (1890)	8, 9
Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)	18
Mathias v. WorldCom Technologies, Inc., 121 S.Ct. 1224 (2001).	19
Nevada v. Hall, 440 U.S. 410 (1979)	10
Principality of Monaco v. Mississippi, 292 U.S. 313 (1934)	9
Raygor v. Regents of the University of Minnesota, 121 S.Ct. 2214 (2001)	19
Seminole Tribe v. Florida, 517 U.S. 44 (1996)	8
Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)	15
United States v. Texas, 143 U.S. 621 (1892)	9
Ex Parte Young, 209 U.S. 123 (1908).	9

TABLE OF AUTHORITIES—Continued

	Page
CONSTITUTIONS AND STATUTES	
U.S. Const., Art. II, § 3	11
U.S. Const. Art. II, § 2, cl. 2	13
U.S. Const. Amen. XI	8
1 Stat. 109 (1790)	14
1 Stat. 110 (1790)	14
39 Stat. 728 (1916)	2
49 Stat. 1985 (1936)	2
Reorganization Plan No. 7 of 1961, 75 Stat. 840 ..	2, 13
Reorganization Plan No. 21 of 1950, 64 Stat. 1273	2
5 U.S.C. § 553	15
5 U.S.C. § 554	3, 14
5 U.S.C. § 3105	15
46 U.S.C. app. §§ 1701*et seq.*	1
46 U.S.C. app. §§ 1704-09	2, 14
46 U.S.C. app. § 1710	2, 3, 4, 14
46 U.S.C. app. §§ 1713	4
46 U.S.C. app. §1714	2, 14
46 U.S.C. app. §1716	2, 14
46 U.S.C. app. §1718	2, 14
46 C.F.R. § 502.142	3
46 C.F.R. § 502.223	3
46 C.F.R. § 502.227(a)(6)	3
MISCELLANEOUS	
Easterbrook, *"Success" and the Judicial Power*, 65 Ind. L.J. 277 (1990)	14
Executive Order No. 6166, § 12 (1933)	2
18 J. Pat. Off. Soc. (July 1936)	14

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of sixty-four national and international unions representing more than thirteen million working women and men, files this brief *amicus curiae* in support of Petitioner with the consent of the parties, as provided for in the Rules of this Court.

STATEMENT

1. The Shipping Act of 1984, 46 U.S.C. app. §§ 1701 *et seq.*, sets out Congress' comprehensive scheme for regulating oceanborne commerce and, as an aspect thereof, "marine terminal operators"—*viz.*, operators of domestic port facilities in interstate and foreign commerce.[1] As *California v. United*

[1] The principal substantive provisions of the Shipping Act of 1984 are carried over from the Shipping Act of 1916, 39 Stat. 728.

States, 320 U.S. 577, 585-86 (1944), makes clear, Congress has the constitutional authority to enact such legislative regulations and to make its enactment run to State marine terminal operators such as the Respondent South Carolina State Ports Authority ("SCSPA").

As an integral part of the Shipping Act scheme, Congress established the Federal Maritime Commission ("FMC," or "the Commission"), an administrative agency composed of five Commissioners who are appointed by the President by and with the advice and consent of the Senate and who are removable by the President "for inefficiency, neglect of duty, or malfeasance in office." Reorganization Plan No. 7 of 1961, Part I, §§ 102(a), 75 Stat. 840. And, Congress empowered the FMC, "as the expert body . . . for safeguarding this specialized aspect of the national interest," *California v. United States*, 320 U.S. at 584, to administer the Shipping Act's provisions, Reorganization Plan No. 7 of 1961, Part I, §§ 101-103, 75 Stat. 840. [2]

In carrying out its regulatory responsibilities, the FMC performs a range of administrative tasks, including the issuing of licenses, the promulgation of rules and regulations, the institution of investigations, and the monitoring of compliance with the Act's requirements. *See* 46 U.S.C. app. §§ 1704-09, 1714, 1716, 1718.

Of immediate relevance here, Congress has, through § 11 of the Shipping Act, 46 U.S.C. app. § 1710, authorized the

[2] Since the enactment of the Shipping Act of 1916, Congress' regulatory mandate has been administered by an administrative agency, variously denominated as the "United States Shipping Board" from 1916-33, see 39 Stat. 728 (1916), the "United States Shipping Board Bureau" from 1933-36 see Executive Order No. 6166, § 12 (1933), the "United States Maritime Commission" from 1936-50, 49 Stat. 1985 (1936), the "Federal Maritime Board" from 1950-61, see Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and, since 1961, the FMC, see Reorganization Plan No. 7 of 1961, Part I, §§ 101, 75 Stat. 840.

FMC to investigate complaints alleging a marine terminal operator's non-compliance with the Shipping Act through an administrative process culminating in an FMC report and order.[3]

When "any person" files such a complaint, the named respondent, and upon notice by the FMC, the named terminal operator must either "satisfy the complaint or answer it in writing." *Id.* § 1710(b). If the complaint is not satisfied, the Act provides that "the Commission shall investigate it in an appropriate manner and make an appropriate order." *Id.*

In the event of a formal complaint, the Commission discharges its duty to "investigate [the complaint] in an appropriate manner" through the adjudication process delineated in the Administrative Procedure Act, 5 U.S.C. § 554. *See* 46 C.F.R. § 502.142. The Commission employs Administrative Law Judges ("ALJs") and delegates to the ALJs the responsibility of holding hearings that generate an administrative record on which the Commission bases its decision, and of-forwarding to the Commission "initial or recommended" findings of fact and conclusions of law, 46 C.F.R. § 502.223, which are subject to plenary review by the Commission, either at the instance of a party or on the Commission's own motion. 46 C.F.R. § 502.227(a)(6).

The Commission is required to "make a written report of every investigation made under this chapter in which a hearing was held stating its conclusions, decisions, findings of fact, and order." 46 U.S.C. app. § 1710(f). An FMC "report" is not self-enforcing and does not have any of the coercive legal force and effect of a judicial decision and order. Rather, its independent force and effect is that of an authoritative statement by the federal agency, charged with

[3] The statute provides in relevant part that "[a]ny person may file with the Commission a sworn complaint alleging a violation of this chapter . . . ." 46 U.S.C. app. § 1710(a).

the administration of the Shipping Act, of the agency's factual and legal determinations on the marine terminal operator's compliance with the Act ("its conclusions, decisions, [and] findings of fact," 46 U.S.C. app. § 1710(f)) and the agency's directions ("its . . . order," *id.*) as to what actions the terminal operator needs to take to bring itself into compliance with the Act. To have coercive legal force and effect, a Commission "report" must be enforced by an Article III federal court and the Commission order must be embodied in a judgment issued by the court. *See* 46 U.S.C. app. §§ 1713(c) and (d).[4]

2. In this case, a private party, South Carolina Maritime Services, Inc. ("Maritime Services"), filed a formal complaint with the Commission alleging that the South Carolina State Ports Authority was discriminatorily denying Maritime Services a berth at SCSPA's Charleston, South Carolina marine terminal in violation of the Shipping Act. Joint App. 7-17. The complaint requested that the Commission (1) seek injunctive relief in federal district court enjoining SCSPA from denying Maritime Services berthing rights; (2) direct the SCSPA to pay reparations for Maritime Services' lost profits and business opportunities by reason of SCSPA's denial of berthing rights; and (3) direct SCSPA to cease and desist from denying Marine Services berthing rights in violation of the Shipping Act. Joint App. at 16.

The SCSPA moved to dismiss on the ground relevant here that the Eleventh Amendment bars FMC administrative

[4] The Shipping Act provides two principal judicial enforcement mechanisms: For "nonreparation orders"—that is, orders adjudging a regulated entity in violation of a Commission order or subpoena—"the Attorney General, at the request of the Commission, or any party injured by the violation, may seek enforcement by a United States district court having jurisdiction over the parties." 46 U.S.C. app. § 1710(c). For reparation orders, the statute provides that "the person to whom the award was made may seek enforcement of the order in a United States district court having jurisdiction of the parties." *Id.* § 1710(d).

proceedings against a State on Maritime Services' complaint. Joint App. 41-44. The ALJ agreed and ruled that the complaint proceedings be terminated. Pet. App. 49a-62a.

The FMC reviewed this initial decision on its own motion and determined that the SCSPA was not immune from Commission administrative proceedings by virtue of the State's Eleventh Amendment immunity/constitutional sovereign immunity. Pet. App. 29a-35a. Consequently, the Commission reversed the ALJ's decision and remanded the matter with directions that the ALJ consider the remaining arguments SCSPA made in support of its motion to dismiss. Pet. App. 37a. SCSPA thereupon petitioned the Court of Appeals for the Fourth Circuit for review of the Commission's decision.

The Fourth Circuit reversed the Commission's determination and remanded the case with instructions to dismiss the FMC complaint proceeding. In so doing the Court of Appeals ruled that state sovereign immunity bars "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states," Pet. App. at 13a, and that this rule holds whether the proceeding takes the form of an administrative adjudication "within the Executive Branch" or a judicial adjudication, *id* at 15a.

SUMMARY OF ARGUMENT

The States' Eleventh Amendment immunity/constitutional sovereign immunity is an immunity from one particular means of enforcing federal legislation: *private party lawsuits* in a *judicial* forum. Where a private party lawsuit against a State seeks a coercive judicial order in the form of a *money judgment*, this Court has, moreover, hewed to the strictest view of State sovereign immunity so as to protect the State fisc from coercive judicial exactions at the instance of private parties.

At the same time, the Court has made it clear that the States have *no* Eleventh Amendment immunity and *no* constitutional sovereign immunity against federal government lawsuits in judicial fora—even when those lawsuits seek a money judgment against a State.

This case involves a congressional authorization to a federal administrative agency to exercise administrative law enforcement powers—powers far more limited than the coercive power of judicial tribunals—to investigate private party complaints of state non-compliance with federal law and to issue an agency report on its findings and conclusions and an agency compliance order.

This agency law enforcement power is an executive power analogous to a federal executive officer's law enforcement power to investigate state compliance with federal law and, on finding cause to believe that there is noncompliance, to bring a federal government lawsuit against the State. In both instances, Congress has authorized politically accountable federal government officers to act, on behalf of the Federal Government, to enforce a valid, binding federal law against the States. That being so, it follows from the developed state sovereign immunity jurisprudence that both of these authorizations to exercise federal government law enforcement power are constitutionally permissible, and that neither one is subject to a state sovereign immunity bar.

The Court of Appeals, to the contrary, vouchsafed the States an immunity here on the proposition that "any proceeding in which a federal officer adjudicates disputes between private parties and unconsenting states" is constitutionally invalid, irrespective of "whether the forum be a state court, a federal court, or a federal administrative agency." Pet. App. 13a. The Court of Appeals' proposition is false in that it rests on a false equation of administrative adjudications and judicial adjudications. The agency officers are politically accountable executive officers of the United

States, not politically unaccountable judicial officers; and the agency is empowered to issue reports and orders that are not self-enforcing, not to issue judicial decisions and orders with coercive legal force and effect. In every regard, then, a private party complaint invoking administrative agency law enforcement power and the resulting proceeding and agency action and a private party lawsuit invoking the judicial power and the resulting proceedings and judicial action are of a different legal order in their nature and consequences.

ARGUMENT

It is settled beyond peradventure that Congress has the constitutional authority to regulate the operation of marine terminal facilities in interstate and foreign commerce through the Shipping Act and to empower the Federal Maritime Commission ("FMC"), as an administrative agency of the United States, to enforce the Act, *inter alia*, through administrative proceedings on "any person['s]" complaint that a regulated entity is in non-compliance with the Act, leading to an FMC "report" enforceable in a federal court proceeding.

We submit that, where a State is the maritime terminal operator, nothing in the Constitution stands in the way of such a Congressional exercise of its Article I legislative power or of such a legislatively authorized FMC exercise of the federal government's law enforcement power. The States' Eleventh Amendment immunity/state sovereign immunity is an immunity against the invocation by a *private party* of the *judicial power*. It is *not* a more generalized immunity against federal legislative regulation through enactments such as the Shipping Act, nor is it an immunity against law enforcement actions by, and in the name of, the Federal Government, such as the FMC's investigation of a formal complaint and the agency's report thereon stating the

agency's conclusions, decisions, findings of fact, and compliance order.

1. The States' Eleventh Amendment immunity/constitutional sovereign immunity is an immunity from one particular means of enforcing federal legislation: *private party lawsuits* in a *judicial* forum.

The Eleventh Amendment in terms forbids the exercise of "*[t]he Judicial power* of the United States" to entertain "*any suit* in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or Subjects of any Foreign State." U.S. Const., Amen. XI (emphasis added). And, the decisions of this Court treating with the States' Eleventh Amendment immunity in its particulars, and with the States' constitutional sovereign immunity as a more general protection, describe the immunity as one from the exercise of judicial power at the behest of a private party. *See, e.g., In re Ayers*, 123 U.S. 443, 505 (1887) ("The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process *of judicial tribunals at the instance of private parties*." (emphasis added)); *Hans v. Louisiana*, 134 U.S.1,13 (1890) ("'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" (quoting The Federalist No. 81)); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States." (citation and internal quotation marks omitted)).

Where a private party lawsuit against a State seeks a coercive judicial order in the form of a *money judgment*, this Court has, moreover, hewed to the strictest view of State

sovereign immunity so as to protect the State fisc from coercive judicial exactions at the instance of private parties.[5]

Of equal moment here, the Court has made it clear that the States have *no* Eleventh Amendment immunity and *no* constitutional sovereign immunity against federal government lawsuits in judicial fora—even when those lawsuits seek a money judgment against a State. *See, e.g., Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934) (federal court jurisdiction over "a suit by the United States against a State ... without the consent of the latter ... is inherent in the constitutional plan" and collecting cases); *United States v. Texas*, 143 U. S. 621, 644-645 (1892) ("We cannot assume that the framers of the constitution, while extending the

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[5] As this Court emphasized in *Hans v. Louisiana*, 134 U.S. 1 (1890)—the fountainhead of Eleventh Amendment/constitutional state sovereign immunity jurisprudence—invoking federal court jurisdiction to seek damages remedies against an unconsenting State, as the *Hans* plaintiff attempted, cuts to the heart of the State's immunity:

> '[T]here is no color to pretend that the state governments would, by the adoption of [the plan of the Constitutional Convention], be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. .... [T]o ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.' [134 U.S. at 13 (quoting The Federalist No. 81 (Hamilton).]

See also Great Northern Life Ins. v. Read, 322 U.S. 47, 54 (1944) (noting that "when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration" only a clear statement of the State's consent "to submit its fiscal problems" to the federal courts "must be found")

This Court's treatment of private party lawsuits for *prospective relief* supplies an illuminating contrast. While adhering to the concept of the States' sovereign immunity, the Court has permitted such suits to go forward pursuant to the doctrine of *Ex Parte Young*, 209 U.S. 123, 159-60 (1908).

judicial power of the United States to controversies between two or more states of the Union, and between a state of the Union and foreign states, intended to exempt a state altogether from suit by the general government.")

This Court's recent decision in *Alden v. Maine*, 527 U.S. 706 (1999), sets out the fullest elaboration of both aspects of the Eleventh Amendment immunity/constitutional state sovereign immunity law. *Alden* explains that the "immunity [of the States] from private suits [is] central to sovereign dignity," *id.* at 715, as a protection from lawsuits in which a politically unaccountable private party can invoke the coercive process of the politically unaccountable judiciary to effect an interference with the political decisionmaking of the State; and this is particularly so where that interference takes the form of a money judgment action which would enable the private party to levy upon the State treasury.[6]

"Private suits against nonconsenting States," said the Court, "present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Alden*, 527 U.S. at 749 (quoting *In re Ayers*, 23 U.S. at 505). When the power to invoke "the coercive process of judicial tribunals" is delegated to private parties, "[n]ot only must a State defend or default but also it must face the prospect of being thrust, ... against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on [the State] treasury ...." *Alden*, 527 U.S. at 749. In that way, "[a] general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their

[6] *Alden*, in relying on the concept of general constitutional state sovereign immunity, emphasized that such an immunity was an inherent aspect of the State's *own* judicial system, and indeed distinguished the holding of *Nevada v. Hall*, 440 U.S. 410 (1979), in significant part on that ground. *See Alden*, 527 U.S. at 738-39.

citizens [regarding] the allocation of scarce resources among competing needs and interests." *Id.* at 749-50.

As *Alden* further makes clear, given the nature and theory of the States' Eleventh Amendment immunity/constitutional sovereign immunity, the States have *no* immunity against the delegation to Federal Government officers—acting for and in the name of the United States—of the power to invoke "the coercive process of judicial tribunals," including the process through money judgments of levying on the State treasury:

> A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to "take care that the laws be faithfully executed," U.S. Const., Art. II, § 3, differs in kind from the suit of an individual: While the Constitution contemplates suits among the members of the federal system, the fear of private suits against nonconsenting states was the central reason given by the Founders who chose to preserve the States' sovereign immunity. Suits by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States. [527 U.S. at 755-56.]

In sum, by "ratifying the Constitution, the States consented to suits brought ... by the Federal Government," *Alden*, 527 U.S. at 755—as suits in which "the National Government must itself deem the case of sufficient importance to take action against the State," *id.* at 759-60—but not to suits by private parties.

What Congress does in authorizing federal government lawsuits is to authorize politically accountable officers of the United States, who are entrusted with the duty "to take Care that the Laws be faithfully executed," to act for and in the name of the United States to enforce federal law. And, what

this Court's state sovereign immunity decisions recognize is that such a Congressional authorization of federal government law enforcement action against a State is in no way barred by the States' Eleventh Amendment immunity/constitutional sovereign immunity. By reason of the constitutional plan, the United States is the national sovereign with both the constitutionally enumerated sovereign power to enact laws that run to the States and the sovereign power to take governmental action in its own name to enforce those laws.

2. The Court has, of course, traced out its state sovereign immunity jurisprudence in cases involving a lawsuit against a State looking to judicial proceedings and a judicial decision and order with coercive legal force and effect. And, as we have seen, in that context state sovereign immunity *is* a bar to congressional authorization to private parties to enforce federal law against a State by invoking the coercive process of judicial tribunals—but state sovereign immunity is *no* bar to congressional authorization to officers of the United States, acting by and on behalf of the Federal Government to enforce federal law by invoking judicial power.

This case, in its turn, involves a congressional authorizeation to a federal administrative agency to exercise administrative law enforcement powers—powers far more limited than the coercive power of judicial tribunals—to investigate private party complaints of state non-compliance with federal law and to issue an agency report on its findings and conclusions and an agency compliance order.

As we develop, this agency law enforcement power is an executive power analogous to a federal executive officer's law enforcement power to investigate state compliance with federal law and, on finding cause to believe that there is noncompliance, to bring a federal government lawsuit against the State. In both instances, federal officers have and exercise a federal government law enforcement power to

take action against the State through the legal process. It follows from the developed state sovereign immunity law that in both instances there is no immunity bar to the federal government law enforcement action. And, that being so, it would stretch state sovereign immunity past the breaking point to grant that immunity on the basis that the agency law enforcement action is taken on the petition of a private party for such agency action in the form of a complaint that forms the basis for an APA administrative adjudicatory proceeding.

(a) The Federal Maritime Commissioners—through whom the Commission acts—are constitutional "Officers of the United States," within the contemplation of U.S. Const. Art. II, § 2, cl. 2, empowered to exercise "significant governmental dut[ies] pursuant to public law," *Buckley v. Valeo*, 424 U.S. 1, 140-41 (1976). The Commissioners are appointed by the President and can be removed by the President for cause.[7] The Commissioners, like the federal executive officers who are authorized to bring federal government lawsuits, are thus politically accountable federal officers "who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed,'" *Alden*, 520 U.S. at 755 (citation omitted).

(b) To enable the Commissioners to carry out that duty, Congress has empowered the Commission to administer the Shipping Act and secure its enforcement by promulgating rules and regulations; issuing and revoking licenses; conducting investigations and issuing reports stating its findings, conclusions, and orders; pursuing court actions; and

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[7] While the President's power to remove Commissioners for "inefficiency, neglect of duty, or malfeasance in office," Reorganization Plan No. 7 of 1961, Part I, §§ 102(a), 75 Stat. 840, is not plenary, as is the case with, say, Cabinet-level agency officers, the statutory grounds for removal are, as this Court has held in another context, "very broad" and "could sustain removal ... for any number of actual or perceived transgressions." *Bowsher v. Synar*, 478 U.S. 714, 729 (1986).

invoking the aid of the Attorney General to secure judicial enforcement of its administrative actions in court. *See* 46 U.S.C. app. §§ 1704-10, 1714, 1716, 1718.

In all of these endeavors, the Commission—acting through the Commissioners—exercises *executive power*. As Justice Scalia succinctly and accurately put the point in general terms, "administrative board[s of the United States] exercise the executive power, not the judicial power of the United States." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 909 (1991) (Scalia, J., concurring in part and concurring in the judgment). And, as he added in specifics, this is true of all such boards that act through executive officers—both those that are "subdivisions of traditional executive departments" like the "Comptroller of the United States," which is "within the Treasury Department," *id.*, and those that are independent regulatory agencies such as the Federal Communications Commission or the National Labor Relations Board, *id.* at 912.

And, as Justice Scalia stressed, an administrative agency acting through an administrative adjudicative process, no less than an agency acting through a rule-making process, is exercising executive power:

> The first Patent Board, which consisted of Thomas Jefferson, Henry Knox, and Edmund Randolph in their capacities as Secretary of State, Secretary of War, and Attorney General, respectively, 1 Stat. 109, 110 (1790), adjudicated the patentability of inventions, sometimes hearing argument by petitioners. *See* 18 J. Pat. Off. Soc. 68-69 (July 1936). They were exercising the *executive* power. *See* Easterbrook, "Success" and the Judicial Power, 65 Ind. L. J. 277, 280 (1990). Today, the Federal Government has a corps of administrative law judges numbering more than 1,000, whose principal statutory function is the conduct of adjudication under the Administrative Procedure Act (APA), *see* 5 U.S.C. 554, 3105. They are all *executive* officers. "Adjudication," in other words, is no more an "inherently" judicial function than the promulgation of rules governing primary conduct is an "inherently" legislative one. *See Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); APA, 5 U.S.C. 553 ("Rule making"). [*Freytag*, 501 U.S. at 910 (Scalia, J., concurring in part and concurring in the judgment).]

It is very much to Justice Scalia's last point that the FMC's power to conclude an agency proceeeding by issuing an agency report "stating the Commission's conclusions, decisions, [and] findings of fact" on its investigation of a noncompliance complaint, and setting out its compliance "order" is of an entirely different and far more limited nature than a court's judicial power to conclude a lawsuit by issuing a judicial decision and judgment. The FMC's report and its compliance order are not self-enforcing and do not have the coercive legal force and effect of a judicial decision and order. In its own terms, the FMC report's sole force and effect is that generated by an authoritative statement by the federal agency charged with the administration of the Shipping Act of (a) the agency's factual and legal determinations on the marine terminal operator's compliance with the Act, and (b) the agency's directions as to what actions the marine terminal operator needs to take to bring itself into compliance with the Act. A private party who files a formal complaint with the FMC and invokes the FMC's law enforcement process is not invoking "the coercive process of [a] judicial tribuna[l]."

While Justice Scalia's *Freytag* opinion is one concurring in part and concurring in the judgment, the central issue in that case, and the one on which the Court divided, was whether the Tax Court was properly characterized, for the purposes of the Appointments Clause, as a "Departmen[t]" exercising the executive power of the United States or a "Cour[t] of law"

exercising the judicial power of the United States. *Compare Freytag*, 501 U.S. at 884-92, *with id.* at 908-22 (Scalia, J., concurring in part and concurring in the judgement). The points Justice Scalia made on the status and nature of the federal administrative agencies like the FCC, the NLRB, and the FMC, which he argued applied to the Tax Court as well, state settled understandings and were not disputed by the *Freytag* majority, which instead disputed their applicability to the Tax Court as an Article I court.[8]

The short of the matter is that the FMC, in investigating private complaints of Shipping Act noncompliance by a State and in issuing a Commission report "stating its conclusions, decisions, findings of fact, and order"—like a federal executive officer investigating a State's compliance with federal law and then bringing a federal government lawsuit against the State—is exercising an executive power. In both instances, Congress has authorized politically accountable federal government officers to act, on behalf of the Federal Government, to enforce a valid, binding federal law against the States. That being so, both of these authorizations to exercise federal government law enforcement power are

[8] Indeed, the *Freytag* Court was at pains to stress that its opinion did not "address ... any question involving the appointment of an inferior officer by the head of one of the principal agencies." 501 U.S. at 887 n.4. In this regard, it bears noting that, on application of the *Freytag* Court's test for determining whether the Tax Court was a "Cour[t] of law," it is plain that the FMC cannot by any stretch be considered such a court. Unlike the Tax Court—which, as the *Freytag* Court stressed, exercises "judicial power to the exclusion of any other function" and which exercises such "quintessentially judicial" powers as the power to grant injunctive and monetary relief and to enforce those judgments through contempt, *id.* at 891—the FMC "perform[s] multiple [administrative] functions," *id.* at 892, and does not have the authority to grant orders with the coercive legal force and effect of a court judgment.

constitutionally permissible, and neither one is subject to a state sovereign immunity bar.[9]

3. The Court of Appeals, to the contrary, vouchsafed the States an immunity here on the proposition that "any proceeding in which a federal officer adjudicates disputes between private parties and unconsenting states" is constitutionally invalid, irrespective of "whether the forum be a state court, a federal court, or a federal administrative agency." Pet. App. 13a.

The Court of Appeals' proposition is false in that it rests on a false equation of administrative adjudications and judicial adjudications: The agency officers here are politically accountable executive officers of the United States, not politically unaccountable judicial officers; and the agency is empowered only to issue reports and orders that are not self-enforcing, not to issue judicial decisions and orders with coercive legal force and effect. In every regard, then, a private party complaint invoking administrative agency law enforcement power, on the one hand, and a private party lawsuit invoking the judicial power, on the other, are of a different legal order in their nature and consequences.

4. We emphasize that we have addressed *only* the question of the State's immunity in the FMC administrative law enforcement proceeding presented by this case and that we have not addressed the question of state sovereign immunity to a private party lawsuit against a State seeking enforcement of an FMC report and order. This is because there has been no such enforcement lawsuit here and, as interesting as the

[9] As stated in footnote 4, above, Congress has provided for different means of judicial enforcement with respect to administrative reparation and nonreparation orders. Both forms of relief were sought by the complainant in this proceeding, but the only question before this Court is whether the State has a valid sovereign immunity defense to the FMC proceeding itself.

question of the State's immunity to such a lawsuit may be, it is simply not presented by this case. We should note, however, that a private party lawsuit invoking the coercive process of judicial tribunals would at least implicate the substance of state sovereign immunity jurisprudence in a way that this case does not. At the same time, the lawsuit would be based on the law enforcement action of a federal administrative agency in the form of the agency report stating the agency's conclusions, decisions and findings of fact regarding a State's compliance with a valid and binding federal law and setting out the agency's compliance order addressed to the State. In that sense, such an enforcement lawsuit is markedly different from a lawsuit initiated *entirely* by a politically unaccountable private party invoking the coercive process of a politically unaccountable judicial tribunal to pursue the party's private right of action. Thus, the immunity question posed by an enforcement lawsuit is a novel and complex one that should await resolution in a case that in fact raises that question.

* * *

Over the past several years, this Court has invalidated on state sovereign immunity grounds a number of congressional efforts to provide for the effective enforcement of valid, binding federal laws against the States. *See, e.g., Board of Trustees of Univ. Of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U. S. 62 (2000); *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44 (1996). Indeed, in the 1998 Term, the Court invalidated three such statutes in one day. *See Alden v. Maine*, 527 U. S. 706, 755 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627, 636 (1999).

Propelled by the gathering force of this furthering wind, the parties in three cases before the Court this Term are seeking

to greatly extend the state sovereign immunity bar by having three additional congressional enactments providing for the enforcement of valid, binding laws against the States limited or invalidated.[10] In each of these cases, we believe, invalidation would require a significant extension of existing doctrine and would frustrate even further the continuing efforts of the Legislative Branch to provide for effective enforcement of duly enacted and valid laws. As we have shown, no such extension is warranted here. Rather, due regard for the proper role of each branch of the Federal Government requires reversal of the judgment below.

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[10] In addition to this case, see *Raygor v. Regents of the University of Minnesota*, No. 00-1514, 121 S. Ct. 2214 (*cert. granted* June 4, 2001); *Mathias v. WorldCom Technologies, Inc.*, No. 00-878, 121 S. Ct. 1224 (*cert. granted* March 5, 2001).

CONCLUSION

For the foregoing reasons, the decision and judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

FEDERAL MARITIME COMMISSION,
PETITIONER,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
INTEREST OF THE *AMICUS* AND CONSENT OF THE PARTIES	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. The moving force behind the Constitution was the need to constrain States with maritime ports from using those ports to discriminate against the maritime commerce of citizens of other States and of foreign nations	2
II. Congress has chosen to encourage the foreign maritime commerce of the United States by prohibiting disparate treatment in the operation of maritime ports and by establishing a simple and uniform regulatory process	7
III. If the federal government has exclusive sovereignty over the maritime commerce of the United States, then the federal government may preclude the States from exercising any "economic advantage" by State ownership of the maritime ports within their borders	8
IV. In any event, the Fourteenth Amendment gives Congress the power to require the States to answer complaints of disparate treatment by port users	9
CONCLUSION	10

TABLE OF AUTHORITIES

CONSTITUTION — Page

Article I 8
Fourteenth Amendment 9

CONSTITUTIONAL HISTORY

Benjamin Harrison (Governor of Virginia)

Letter to Thomas Jefferson, dated April 16, 1784, J. Boyd (ed.), 7 THE PAPERS OF THOMAS JEFFERSON 678 (Princeton Univ. Press 1953) 3-4

Thomas Jefferson

Letter to James Monroe, dated June 17, 1785, J. Boyd (ed.), 8 THE PAPERS OF THOMAS JEFFERSON 231 (Princeton Univ. Press 1953) 3

Letter to Edward Carrington, dated August 4, 1787, J. Boyd (ed.), 11 THE PAPERS OF THOMAS JEFFERSON 678 (Princeton Univ. Press 1955)..... 6

James Madison

"Vices of the Political System of the United States," dated April 1787, B. Kurland (ed.), 1 THE FOUNDERS' CONSTITUTION 166 (Univ. of Chicago Press 1987) 5-6

George Washington

Letter to James Warren, dated October 7, 1785, B. Kurland (ed.), 1 THE FOUNDERS' CONSTITUTION 161 (Univ. of Chicago Press 1987) 3

TABLE OF AUTHORITIES—Continued

Page

"Proceedings of Commissioners to Remedy Defects of the Federal Government," dated September 14, 1786. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. Facsimile available at www.yale.edu/lawweb/avalon/annapoli.htm..... 5

"Resolution of the General Assembly of Virginia," dated January 21, 1786. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. Facsimile available at www.yale.edu/lawweb/avalon/const/const03.htm 4

CASES

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2000)..... 9
California v. United States, 320 U.S. 577 (1944).. 7
United States v. Lopez, 514 U.S. 549 (1995)..... 8

STATUTES

46 U.S.C. App. § 1701(1) 7
46 U.S.C. App. § 1701(4) 7

LEGISLATIVE HISTORY

53 Cong. Rec. 8276 (1916)..... 7

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

INTRODUCTION

This case presents for the first time a clash between State sovereign immunity and the moving force behind the Constitution: the need for uniformity in maritime commerce. Between 1781 and 1787, States with maritime ports discriminatorily denied the use of those ports to the maritime commerce of other States and of England, France, and Holland. The Constitutional Convention was called to restrain this maritime trade war, which threatened the unity and peace of this new nation. Those who wrote and ratified the Constitution intended the sovereign immunity of the States to yield to the need for a uniform power over maritime commerce.*

INTEREST OF THE *AMICUS* AND CONSENT OF THE PARTIES

The National Association of Waterfront Employers ("NAWE") is a nationwide association of private sector maritime terminal operators subject to regulation under federal law by Petitioner, the Federal Maritime Commission. Respondent, South Carolina State Ports Authority, is a maritime terminal operator arguing that it is not subject to the private complaint jurisdiction of the Federal Maritime Commission because it is entitled to sovereign immunity as a State agency. NAWE's members, being subject to federal

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* In accordance with this Court's Rule 37.6, counsel of record states that he is the sole author of this brief and that no person or entity other than the named *amicus* party has made a monetary contribution to the preparation or submission of this brief.

regulation, have an interest in ensuring that federal regulation applies equally to all maritime terminal operators, including State agencies such as Respondent.

The parties have consented to the filing of NAWE's brief, and their letters of consent have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The maritime ports of the United States are points of entry and exit for the ocean commerce of the nation as a whole. The ports are limited in number and serve large areas of the nation that have no other means of ocean access. A State can have sovereign immunity in the operation of maritime ports within its borders only if the constitutional structure gives to each maritime State a measure of sovereignty over the ocean commerce of the nation as a whole, an untenable result. The Founders intended in the constitutional structure to preserve State sovereignty, but not over maritime commerce.

Congressional power over maritime commerce, including its starting and ending points, is plenary. The court below concedes that Congress could operate the maritime ports directly. It follows that the States may operate maritime ports only with the consent of Congress and under such conditions as Congress may impose.

ARGUMENT

I. The moving force behind the Constitution was the need to constrain States with maritime ports from using those ports to discriminate against the maritime commerce of citizens of other States and of foreign nations.

The Founders regarded the maritime competition between the States after the Revolutionary War as the greatest threat to the prosperity and even the survival of the United States. In 1784 Thomas Jefferson succeeded Benjamin Franklin as America's ambassador to France. From that vantage point

Jefferson saw the harm that the States were doing to themselves and to each other in their competition for trade. In 1785 he wrote to James Monroe:

> You see that my primary object in the formation of treaties is to **take the commerce of the states out of the hands of the states**, and to place it under the superintendence of Congress, so far as the imperfect provisions of our constitution will admit, and until the states shall by new compact make them more perfect. I would say then to every nation on earth,—by treaty—, your people shall trade freely with us, & ours with you, paying no more than the most favoured nation, **in order to put an end to the right of individual states** acting by fits and starts **to interrupt our commerce or to embroil us with any nation.**

Letter from Thomas Jefferson to James Monroe dated June 17, 1785, printed in J. Boyd (ed.), 8 THE PAPERS OF THOMAS JEFFERSON 231 (Princeton Univ. Press 1953) (JEFFERSON PAPERS) (emphasis added). Later that year, George Washington wrote:

> [W]e have abundant reason to be convinced, that the spirit for Trade which pervades these States is not to be restrained; it behooves us then to establish just principles; and this, any more than other matters of national concern, cannot be done by thirteen heads differently constructed and organized. The necessity therefore, of a controuling power is obvious; and why it should be withheld is beyond my comprehension.

Letter from George Washington to James Warren dated October 7, 1785, printed in B. Kurland (ed.), 1 THE FOUNDERS' CONSTITUTION 161 (Univ. of Chicago Press 1987) (FOUNDERS' CONSTITUTION).

In early 1784, the Governor of Virginia, Benjamin Harrison, had "anxiously" written to Jefferson, who was

then representing Virginia in the Congress, about the trade problem:

> I am anxious to hear whether the other States have followed our example in giving powers to Congress so to regulate the trade of the whole United States as to make effectual oppositions to the restrictions of Great Britain. . . . I am much at a loss to assign a good reason for the refusal of any State so coming into the measure as every man of Sense must see that no effectual opposition can be made individually and that without one takes place immediately it will be hereafter very difficult to force great Britain into measures that may be reciprocally advantageous.

Letter from Harrison to Jefferson dated April 16, 1784, 7 JEFFERSON PAPERS 102.

In 1786, Virginia took the lead. On January 21 of that year the General Assembly of Virginia passed a resolution calling for a uniform system of commerce:

> *Resolved*, That Edmund Randolph, James Madison, jun. Walter Jones, Saint George Tucker and Meriwether Smith, Esquires, be appointed commissioners, who, or any three of whom, shall meet such commissioners as may be appointed by the other States in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same.

DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. A facsimile is available at the Internet site of the Avalon Project at Yale Law School, www.yale.edu/lawweb/avalon/const/const03.htm.

The Virginia Resolution led to a meeting in Annapolis, Maryland on September 11-14, 1786, attended by delegates from New York, New Jersey, Pennsylvania, Delaware, and Virginia. The Annapolis delegates were empowered only to make recommendations on the commerce problem, but they decided "that the power of regulating trade is of such comprehensive extent, and will enter so far into the general System of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Federal System." "Proceedings of Commissioners to Remedy Defects of the Federal Government" dated September 14, 1786. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. A facsimile is available at www.yale.edu/lawweb/avalon/annapoli.htm. The Annapolis delegates recommended that Congress call a convention of all the States. *Id.*

Preparing himself for the Convention, James Madison in April 1787 drew up a list of the "Vices of the Political System of the United States." 1 FOUNDERS' CONSTITUTION 166. This remarkable document reveals that the States, in their competition for the maritime commerce of the warring European Powers, had broken the treaty of peace with Britain, the treaty of friendship with France, and the treaty of commerce with Holland. Madison feared that this "frequent violation of the law of nations" could eventually cause "the greatest of public calamities," war with all of the Powers. He wrote:

> 3. Violations of the law of nations and of treaties.
>
> . . . [N]ot a year has passed without instances of them in some one or other of the States. The Treaty

of peace—the treaty with France—the treaty with Holland have each been violated. The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.

As yet foreign powers have not been rigorous in animadverting on us. This moderation cannot however be mistaken for a permanent partiality to our faults, or a permanent security agst. those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring upon the whole.

4. Trespasses of the States on the rights of each other.

These are alarming symptoms, and may be daily apprehended as we are admonished by daily experience. See the law of Virginia restricting foreign vessels to certain ports—of Maryland in favor of vessels belonging to her own citizens—of N. York in favor of the same.

1 FOUNDERS' CONSTITUTION 167.

Jefferson continued to urge, as he had in 1785, that "the commerce of the states [be taken] out of the hands of the states." Writing from Paris during the Constitutional Convention, he said: "My general plan would be to make the states one as to everything connected with foreign nations, and several as to everything purely domestic. . . . [The] greatest defect [of our government] is the imperfect manner in which matters of commerce have been provided for." Letter from Jefferson to Edward Carrington dated August 4, 1787, 11 JEFFERSON PAPERS 678.

It seems clear that the Founders would be astonished and dismayed to learn from the case now before this Court that State sovereignty is being used to impair the methods chosen by the Federal Government to regulate maritime commerce.

Jefferson's call "to make the states one" in maritime commerce leaves no room for State sovereign immunity over maritime trade. Maritime ports belong to the nation as a whole. The States that choose to own and operate maritime ports do so in public trust for the benefit of all. That trust is part of the original understanding. The court of appeals was wrong to make State-owned maritime ports less subject to the public trust than ports that are privately owned.

II. Congress has chosen to encourage the foreign maritime commerce of the United States by prohibiting disparate treatment in the operation of maritime ports and by establishing a simple and uniform regulatory process.

Congress has established "a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs." 46 U.S.C. App. § 1701(1). Congress has rejected eighteenth century mercantilism in favor of "a greater reliance on the marketplace." 46 U.S.C. App. § 1701(4). There is no place in the Congressional scheme for substantive governmental control of the nation's maritime economy by the States.

To accomplish its objectives, Congress has said that States choosing to operate maritime ports must do so under the rules applicable to private operations. As the House Manager said in the debate leading to passage of the Shipping Act of 1916, "[i]f they do exercise such discrimination, there is no reason why they should not be amenable to the law as well as a private person." 53 Cong. Rec. 8276 (May 18, 1916). The question to the House Manager spoke of "municipal wharves," but this Court has determined that the Congressional Record exchange and the Shipping Act encompass all "public owners of wharves and piers," including those of the States. *California v. United States*, 320 U.S. 577, 585-86 (1944).

The court below held the States to be immune, because of their sovereignty, from private process to enforce the Shipping Act before the Federal Maritime Commission. The court acknowledged that its decision might impede "maritime efficiencies" and produce "economic advantage," but held the concept of State sovereign immunity to be constitutionally more important than the free and uniform flow of the nation's maritime commerce. Petition Appendix at 24a. The court's holding is at odds with our constitutional history, which teaches that the States yielded to the federal government all sovereignty over the maritime commerce of the United States.

III. If the federal government has exclusive soverignty over the maritime commerce of the United States, then the federal government may preclude the States from exercising any "economic advantage" by State ownership of the maritime ports within their borders.

State ownership of maritime ports is a throwback to the discredited mercantilist theory of the eighteenth century. The States have no constitutional "right" to exercise separate sovereignty over the maritime ports of the United States by owning them. The court below acknowledged that "if Congress so chose it could regulate all matters affecting ocean-borne commerce." Petition Appendix at 23a. The court of appeals cited Article I of the Constitution and this Court's decision in *United States v. Lopez*, 514 U.S. 549, 558 (1995), which it read as holding that the "Commerce Clause allows direct regulation of the channels of interstate commerce." Petition Appendix at 23a.

Maritime ports are channels of interstate commerce. If Congress has the power under Article I to take direct control of them, then Congress has the lesser-included power of permitting State ownership of maritime ports subject to whatever conditions Congress may impose, including the Shipping Act requirement that the States answer complaints

of discrimination filed by port users before the Federal Maritime Commission.

IV. In any event, the Fourteenth Amendment gives Congress the power to require the States to answer complaints of disparate treatment by port users.

Congress has clearly expressed an intent make the States answer to private complaints of disparate treatment in the operation of their maritime ports. The Founders identified a history and pattern of such discrimination, and they sought to prevent the conduct by binding the States to the Constitution. The Shipping Act, enacted after the adoption of the Fourteenth Amendment, seeks to carry out the intent of the Founders. The court below held that the Fourteenth Amendment was not in issue because Congress had not purported to use it as a basis for the Shipping Act. Petition Appendix at 21a. The Shipping Act does, however, prohibit the disparate treatment of maritime port users. Congress aimed at conduct proscribed by the Fourteenth Amendment. Since the requirements of the Fourteenth Amendment are otherwise met, no reason appears why State-sponsored disparate treatment between port users should go unremedied if there is not a "rational relationship between the disparity of the treatment and some legitimate governmental purpose." *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 964 (2000) (quotation marks and citations omitted). The complaining party before the Federal Maritime Commission alleged disparate treatment at the Port of Charleston by the State of South Carolina, and should be allowed to put on proof.

CONCLUSION

The decision of the court of appeals, which prevents the Federal Maritime Commission from exercising private complaint jurisdiction over State-owned maritime ports, should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,

Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR UNITED STATES MARITIME ALLIANCE LIMITED AND CARRIERS CONTAINER COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Introduction	1
Interest of the *Amici Curiae*	1
A. What They Have Done	1
B. Who They Are	2
C. What Their Interest Is	4
Summary of Argument	5
Argument	7
State Instrumentalities Engaged In Commercial Activities That Fall Within The Objects Committed By The Plan Of The Convention To The Sovereignty Of The Federal Government Are Subject To Regulation Under Applicable Federal Law By Duly Constituted Federal Regulatory Agencies. There Is No Constitutional Impediment To Requiring Those State Commercial Entities To Defend Complaints Filed By Private Persons In Administrative Proceedings Before The Federal Agencies.	7
A. States' Surrender of Sovereign Immunity	8

Contents

	Page
B. No Constitutional Immunity From Administrative Adjudicatory Proceedings	13
1. Confinement of Sovereign Immunity Doctrine To Judicial Arena	13
2. Resort of Court of Appeals To Ahistorical Literalism	14
3. Lack of Support For Decision Below In Precedent, History, Or Practice	16
4. Lack of Support For Decision Below In Structure of Constitution	20
Conclusion	24

TABLE OF CITED AUTHORITIES

	Page
United States Constitution:	
art. I, § 8, cl. 3, 10	10
art. I, § 9, cl. 5, 6	10
art. I, § 10, cl. 2, 3	10
Eleventh Amendment	13, 14
Cases:	
Alden v. Maine, 527 U.S. 706 (1999)	*passim*
Bethlehem Steel Corp. v. Indiana Port Comm'n, 21 F.M.C. 629 (1979)	17
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)	22
Boston Shipping Ass'n v. FMC, 706 F.2d 1231 (1st Cir. 1983)	4
California v. United States, 320 U.S. 577 (1944)	6, 12, 16
Ceres Marine Terminal, Inc. v. Maryland Port Admin., 27 Shipping Reg. Rep. (P&F) 1251 (FMC 1997), *remanded*, 1998 U.S. App. LEXIS 25733 (4th Cir. 1998)	17

Cited Authorities

	Page
College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999)	22
Connecticut Dept. of Environmental Protection v. OSHA, 138 F. Supp. 2d 285 (D. Conn. 2001)	19
Elhaj-Chehade v. University of Texas, 1999 OCAHO LEXIS 3 (Jan. 28, 1999)	19
Employees of Dept. of Public Health & Welfare of Mo. v. Dept. of Public Health & Welfare of Mo., 411 U.S. 279 (1973)	8, 9, 12
Florida v. United States, 133 F. Supp. 2d 1280 (N.D. Fla. 2001)	19
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)	6, 20, 21
Hans v. Louisiana, 134 U.S. 1 (1890)	13, 15
Harrington & Co. v. Georgia Ports Auth., 23 Shipping Reg. Rep. (P&F) 753 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 1276 (FMC 1986)	17
Hensel v. Office of Chief Administrative Hearing Officer, 38 F.3d 505 (10th Cir. 1994)	19
Hughes v. Oklahoma, 441 U.S. 322 (1979)	10

Cited Authorities

	Page
James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist., 27 Shipping Reg. Rep. (P&F) 1123 (FMC 1997)	17
Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000)	14
Kupferberg v. University of Oklahoma Health Sciences Center, 1994 OCAHO LEXIS 99 (Nov. 21, 1994)	19
M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)	9
New York Shipping Ass'n v. FMC, 854 F.2d 1338 (D.C. Cir. 1988), *cert. denied*, 488 US. 1041 (1989)	4
Ohio Environmental Protection Agency v. United States Dept. of Labor, 121 F. Supp. 2d 1155 (S.D. Ohio 2000)	19
Palmetto Shipping & Stevedoring Co. v. Georgia Ports Auth., 24 Shipping Reg. Rep. (P&F) 50 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 761 (FMC 1988)	17
Pate Stevedore Co. of Mobile v. Alabama State Docks Dep't, 24 Shipping Reg. Rep. (P&F) 657 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 1221 (FMC 1989)	17

	Page
Principality of Monaco v. Mississippi, 292 U.S. 313 (1934)	21
Rhode Island v. United States, 115 F. Supp. 2d 269 (D. R.I. 2000)	19
Ryan Walsh, Inc. v. Port of Houston Auth., No. 97-16, Approval of Settlement (FMC ALJ Apr. 30, 1998), *available at http://www.fmc.gov/dockets/97-16ABC.htm*	17
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)	13
South Carolina v. United States, 199 U.S. 437 (1905)	6, 20
South Carolina State Ports Auth. v. Georgia Ports Auth., 22 Shipping Reg. Rep. (P&F) 1111 (FMC 1984)	17
Southeastern Mar. Co. v. Georgia Ports Auth., 23 Shipping Reg. Rep. (P&F) 530 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 941 (FMC 1986)	17
Stevens Shipping & Terminal Co. v. South Carolina State Ports Auth., 23 Shipping Reg. Rep. (P&F) 267 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 684 (FMC 1985)	17

	Page
United States v. Locke, 529 U.S. 89 (2000)	10
United States v. Texas, 143 U.S. 621 (1892)	21
United States Lines v. Maryland Port Admin., 23 F.M.C. 441 (1980)	17
Volkswagenwerk AG v. FMC, 390 U.S. 261 (1968)	4
Wong-Opasi v. Tennessee, 2000 OCAHO LEXIS 2 (Jan. 11, 2000)	19
Statutes:	
8 U.S.C.A. § 1324a (West 1999 & Supp. 2001)	19
15 U.S.C.A. § 2622 (West 1998)	18
33 U.S.C.A. § 1367 (West 1986)	18
42 U.S.C.A. § 300j-9(i) (West Supp. 2001)	18
42 U.S.C.A. § 5851 (West 1995)	18
42 U.S.C.A. § 6971 (West 1995)	18
42 U.S.C.A. § 7622 (West 1995)	18
42 U.S.C.A. § 9610 (West 1995)	19

Cited Authorities

	Page
46 U.S.C.A. app. § 1701 (West Supp. 2001)	11
46 U.S.C.A. app. § 1702(14) (West Supp. 2001)	11
46 U.S.C.A. app. § 1702(18) (West Supp. 2001)	12
46 U.S.C.A. app. § 1709(d)(1) (West Supp. 2001) ...	11
46 U.S.C.A. app. § 1709(d)(4) (West Supp. 2001) ...	11

Other Authority:

THE FEDERALIST (Robert Scigliano ed., Modern Library Edition, Random House, 2000) 9, 10

INTRODUCTION[1]

The United States Court of Appeals for the Fourth Circuit ruled that the States' sovereign immunity trumps Congress's power to authorize private litigants to obtain redress against state commercial instrumentalities before federal administrative agencies for the instrumentalities' violations of federal law. The Fourth Circuit's decision upsets the plan of the convention that binds the States to the supremacy of federal regulation of objects that were committed by the Constitution to federal sovereignty. The decision of the court of appeals should be reversed.

INTEREST OF THE *AMICI CURIAE*

A. What They Have Done

In 1994, Respondent South Carolina State Ports Authority ("SCSPA") petitioned the Federal Maritime Commission ("FMC"), the petitioner in this case, for approval of certain amendments SCSPA proposed to include in its FMC-filed terminal tariff, which prescribes the terms and conditions SCSPA imposes on customers and contractors utilizing its marine terminal facilities in the Port of Charleston. *See Petition of South Carolina State Ports Auth. For Declaratory Order*, Docket No. 94-24, Final Decision (FMC Aug. 12, 1997), *available at http://www.fmc.gov/dockets/94-24.ord.* SCSPA's proposed tariff amendments included guidelines for the licensing by SCSPA of stevedores and marine terminal operators allowed to use SCSPA's

1. In accordance with SUP. CT. R. 37.6, this is to confirm that no part of this brief was authored by counsel for any party and that only the *amici curiae* contributed monetarily to the preparation and submission of this brief.

facilities and for reserving to SCSPA itself certain terminal functions at the facility, thus denying competitors access to its publicly-owned facilities to perform these functions. Carriers Container Council, Inc. ("CCC"), which joins in this *amici curiae* brief, was permitted by the FMC to intervene in opposition to SCSPA's tariff amendments to protect CCC's carrier-members' right to use the services of stevedores and marine terminal operators of their own choosing. CCC also protested the tariff amendment requiring applicants for stevedore licenses to promote commerce through Charleston because it would unjustly discriminate against multi-port stevedores in violation of federal shipping law.

Just last year CCC and United States Maritime Alliance Limited ("USMX"), the other *amicus* joining in this brief, contemplated the filing of a complaint with the FMC against SCSPA for imposing restrictions at its facility that prohibited CCC's and USMX's carrier-members from utilizing a gate at SCSPA's Charleston terminal that was operated by a marine terminal company that competed with SCSPA. SCSPA staffs its gate with state employees; the competing terminal operator uses longshore workers represented by the International Longshoremen's Association, AFL-CIO ("ILA"). SCSPA's restriction prevented CCC's and USMX's carrier-members from complying with the obligation in their collective bargaining agreement with the ILA that requires them to use longshore workers represented by the ILA.

B. Who They Are

USMX and CCC are non-profit membership associations which are the principal management, multiemployer, collective bargaining representatives for employers of longshore workers on the Atlantic and Gulf Coasts of the

United States. USMX is an association of ocean carriers, port associations, marine terminal operators, and stevedoring companies. USMX's members handle virtually all of the general cargo shipped through United States ports on the East and Gulf Coasts. CCC is an association of the major United States and foreign ocean carriers serving United States ports in connection with the transportation of goods by sea in international trade and commerce. CCC's 25 members during the past calendar year transported to and from United States Atlantic and Gulf ports more than 50 million tons of containerized cargo in the foreign trades of the United States. This cargo volume amounts to approximately three-fourths of all containerized cargo loaded and unloaded at United States Atlantic and Gulf ports.

The principal mission of USMX and CCC is to represent their members in collective bargaining with the ILA — the labor organization that represents dockworkers employed on the Atlantic and Gulf Coasts. USMX is the lead negotiator in Master Contract negotiations with the ILA covering ports from Maine to Texas; CCC is primarily responsible for Master Contract administration. This Master Contract establishes the terms and conditions of employment for tens of thousands of American longshore workers on the Nation's Eastern and Southern shores.

USMX and CCC also represent their members' interests in regulatory matters that affect their business and labor practices. The carrier-members of these associations are the customers of Respondent SCSPA and other state port authorities operating marine terminals in United States ports. The stevedoring- and marine-terminal-members of USMX are the competitors and contractors of these state authorities. In the past, federal shipping law has provided CCC, USMX,

and their members with the means to challenge actions taken by these state port authorities that interfered with the commercial interests of the members of CCC and USMX or impeded the administration of their collective bargaining agreements with the ILA.

C. What Their Interest Is

The extension by the court of appeals in this case of the doctrine of sovereign immunity to proceedings before federal administrative agencies is a crucial issue of constitutional law that affects the interests of CCC, USMX, and their members. If the decision of the court of appeals in this case is allowed to stand, the members of USMX, CCC, and other bargaining and trade associations in the maritime industry will be deprived of the rights provided by Congress to obtain recourse for shipping law violations committed by state commercial instrumentalities operating marine terminals that are essential for the conduct of the members' transportation businesses. These shipping law violations not only may affect the members' commercial interests but also may have a significant impact upon their collective bargaining interests. Indeed, over the years the FMC has decided shipping law cases that have had a direct and immediate impact on collective bargaining in the maritime and longshore industries. *See, e.g., Volkswagenwerk AG v. FMC*, 390 U.S. 261 (1968); *New York Shipping Ass'n v. FMC*, 854 F.2d 1338 (D.C. Cir. 1988), *cert. denied*, 488 US. 1041 (1989); *Boston Shipping Ass'n v. FMC*, 706 F.2d 1231 (1st Cir. 1983).

The *amici* joining in this brief will present the views of customers, competitors, and contractors of state-operated marine terminals and thus provide the perspective of private enterprise in a case that centers on an intergovernmental

controversy. *Amici Curiae* USMX and CCC and their members have a vital and compelling interest in the singularly important constitutional issue involving the applicability of the doctrine of the States' sovereign immunity in federal administrative complaint proceedings.[2]

SUMMARY OF ARGUMENT

The concept of dual sovereignty inherent in our system of government divides sovereign powers between the government of the Union and those of the States. By entering the Union, the States submit to the plan of the convention which requires a *pro tanto* relinquishment of the States' sovereignty to the federal government. Part of that relinquishment includes the States' surrender to the federal government of sovereignty over the regulation of maritime commerce. In enacting the federal shipping statutes, Congress exercises that sovereignty ceded to it by the States. To permit a State through its instrumentality to act in derogation of the prescriptions of federal law would be contradictory and repugnant to the authority granted to the federal government in the plan of the convention.

There is no constitutional impediment to the enforcement of federal law against state commercial instrumentalities in private complaint proceedings before federal administrative agencies. This Court has instructed that an analysis of the proper parameters of the States' sovereign immunity must be informed not only by the language of the Constitution but also by "history, practice, precedent, and the structure of the Constitution." *See Alden v. Maine*, 527 U.S. 706, 754 (1999).

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2. Both Petitioner FMC and Respondent SCSPA have consented to the filing of this *amici curiae* brief. Their written consents have been lodged with the Clerk of the Court.

The language of the Constitution and the prior decisions of this Court have confined the invocation of sovereign immunity to assertions of judicial power against the States. Historically, private complaint proceedings against state instrumentalities involved in activities subject to federal regulation have been a staple of administrative law. This has been particularly true before Petitioner FMC ever since this Court's holding almost a half century ago that state instrumentalities operating marine terminal facilities are subject to regulation under federal shipping statutes. *See California v. United States*, 320 U.S. 577, 585-86 (1944). The decision of the court of appeals, if left undisturbed, places in jeopardy the continuing vitality of private complaint proceedings before the FMC and other federal administrative agencies to redress violations of federal law by state commercial instrumentalities. The principal of constitutional law adopted by the court of appeals is already hindering the enforcement not only of federal shipping laws but also of the whistleblower provisions of federal environmental statutes and the employment discrimination prohibitions of federal immigration statutes.

The decision of the court of appeals in this case is antithetical to the very structure of the Constitution. Dual sovereignty requires that "the two governments — national and state — are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers." *South Carolina v. United States*, 199 U.S. 437, 452 (1905); *see also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579 (1985) (Rehnquist, J., dissenting). Permitting state commercial instrumentalities to invoke immunity in federal administrative proceedings would severely impinge upon the effective furtherance of legitimate federal interests. By the same token, requiring those

instrumentalities to appear before federal agencies to defend complaints by private citizens does no violence to the inherent nature of the States' sovereignty because the instrumentalities are engaging in commercial activities that do not fall within the realm of the States' traditional core governmental functions.

ARGUMENT

State Instrumentalities Engaged In Commercial Activities That Fall Within The Objects Committed By The Plan Of The Convention To The Sovereignty Of The Federal Government Are Subject To Regulation Under Applicable Federal Law By Duly Constituted Federal Regulatory Agencies. There Is No Constitutional Impediment To Requiring Those State Commercial Entities To Defend Complaints Filed By Private Persons In Administrative Proceedings Before The Federal Agencies.

The court of appeals in this case has boldly gone where this Court has never gone before. The court of appeals extended the reach of the doctrine of sovereign immunity, when it ruled that the States of the Union are immune from the exercise of federal Executive Power by an administrative agency established by Congress through the exercise of its Article I powers. It held that a State's sovereign immunity protects it from being brought by a private party not only before a court of law but also before a federal administrative agency (Pet. App. 2a).[3] In the view of the court of appeals, the doctrine of sovereign immunity deprives Congress of the

3. The abbreviation "Pet. App." refers to the separately bound appendix that accompanied the petition for certiorari filed in this case.

authority to permit private parties to hale unconsenting States into *any* adversarial proceeding, including those within the adjudicatory apparatus of federal agencies and commissions (Pet. App. 12a, 25a).

The validity of the rule of decision formulated by the court of appeals turns upon the answers to two separate and distinct questions: (1) did the States in the plan of the convention surrender to the federal government their sovereign immunity over those objects of government regulation delegated to the federal government and, if so, (2) is there any constitutional impediment that prohibits the federal government from exercising the regulatory powers delegated to it by the States over the States themselves in adjudicatory proceedings before federal administrative agencies? *See Employees of Dept. of Public Health & Welfare of Mo. v. Dept. of Public Health & Welfare of Mo.* (hereinafter "*Missouri Employees*"), 411 U.S. 279, 287 (1973) (concurring opinion).

A. States' Surrender of Sovereign Immunity

The common law doctrine of sovereign immunity long predates the Constitution of the United States. *See id.* at 288. Before entering the Union, the States possessed the full aegis of immunity enjoyed by independent sovereigns; upon joining the Union, however, their sovereign immunity was diluted because of the dual sovereignty inherent in our Federalism. *See id.* at 288-89.

"In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the

objects committed to the other." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). By entering the Union, the States submitted to the plan of the convention, which requires a *pro tanto* relinquishment of the States' sovereignty to the federal government.

> At the time our Union was formed, the States for the good of the whole, gave certain powers to Congress, including power to regulate commerce, and by so doing, they simultaneously subjected to congressional control that portion of their pre-existing common-law sovereignty which conflicted with those supreme powers given to Congress.

Missouri Employees, 411 U.S. at 288 (concurring opinion).

This was certainly the understanding of the nature of dual sovereignty when our Nation was formed. Alexander Hamilton commented that prior to the Constitution every State in the Union enjoyed, "as one of the attributes of sovereignty," the right "not to be amenable to the suit of an individual *without its consent* 'and,' [u]nless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States. . . ." THE FEDERALIST NO. 81, at 521 (Alexander Hamilton) (Robert Scigliano ed., Modern Library Edition, Random House, 2000) (emphasis in original). Hamilton did not discuss the "circumstances which are necessary to produce an alienation of State sovereignty" in FEDERALIST NO. 81 because he had already done so in FEDERALIST NO. 32 "in considering the article of taxation." *See id.* at 521. In Hamilton's view, this alienation or surrender of sovereignty under the plan of the convention, which "aims

only at partial union or consolidation" occurs only in three cases:

> where the Constitution in express terms granted an exclusive authority to the Union, where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory and repugnant.*

THE FEDERALIST No. 32, at 192 (Alexander Hamilton) (Robert Scigliano ed., Modern Library Edition, Random House, 2000) (emphasis in original).

While there is no language of federal exclusivity or state prohibition in the Constitution, the exercise of federal authority over the regulation of maritime commerce establishes an exclusive federal preserve. Regulation of maritime commerce was one of the governmental objects delegated by the States to the federal government. *See* U.S. CONST. art. I, § 8, cl. 3, 10; art. I, § 9, cl. 5, 6; art. I, § 10, cl. 2, 3. The need to commit regulatory power over maritime commerce to the federal government to thwart the Balkanizing effects of the States' parochial intervention was one of the primary reasons for the adoption of the Constitution. *See United States v. Locke*, 529 U.S. 89, 99 (2000); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). The plan of the convention, therefore, called for the States to surrender to the federal government sovereignty over the regulation of maritime commerce.[4]

4. Congress's most recent recourse to federal sovereignty over the regulation of maritime commerce involves pending legislation to

(Cont'd)

In enacting the federal shipping statutes, Congress exercises that sovereignty ceded to it by the States. Congress has created an extensive federal statutory and regulatory scheme, which has as one of its objectives a uniformity of regulation for maritime commerce. *See* 46 U.S.C.A. app. § 1701 (West Supp. 2001) (One of the statutory purposes of federal shipping law is "to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of governmental intervention and regulatory costs.").

This shipping law regime requires marine terminal operators "to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property" and to refrain from giving "any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C.A. app. §§ 1709(d)(1), 1709(d)(4) (West Supp. 2001). A marine terminal operator is "a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier. . . ." 46 U.S.C.A. app. § 1702(14) (West Supp. 2001). The term "person" includes "individuals, corporations, partnerships, and associations existing under or authorized

(Cont'd)

establish uniform, national standards for seaport security, *see* Port and Maritime Security Act of 2001, S. 1214, 107th Cong. § 2(17) (July 20, 2001), which has generated intense interest in the wake of the recent terrorist attacks upon our Nation ("It is in the best interests of the United States . . . to be mindful that United States seaports are international ports of entry and that the primary obligation for the security of international ports of entry lies with the Federal government. . . .").

by the laws of the United States or of a foreign country." 46 U.S.C.A. app. § 1702(18) (West Supp. 2001).

State instrumentalities by virtue of their operation of marine terminal facilities are "persons" subject to regulation under the provisions of the federal shipping statutes that govern the conduct of marine terminal operators. *See California v. United States*, 320 U.S. 577, 585-86 (1964).

> [I]t is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies.

See id. at 586.

To permit a State through its instrumentality to act in derogation of the prescriptions laid down by Congress in federal shipping law would be contradictory and repugnant to the authority granted to the federal government in the plan of the convention. The States by empowering Congress to regulate maritime commerce surrendered to exclusive congressional control that portion of their sovereignty that would conflict with that federal regulation. *See Missouri Employees*, 411 U.S. at 288 (concurring opinion).

B. No Constitutional Immunity From Administrative Adjudicatory Proceedings

The second prong of the analysis concerns the presence of any constitutional impediment to the enforcement of congressionally created rights under federal shipping law by private litigants against the instrumentalities of the States that engage in activities subject to shipping law regulation. "When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." *Alden v. Maine*, 527 U.S. 706, 732 (1999).

1. Confinement of Sovereign Immunity Doctrine To Judicial Arena

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996), the Court ruled that the principle of state sovereign immunity embodied in the Eleventh Amendment[5] prevents congressional authorization in federal enactments of suits by private parties in the federal courts against unconsenting States. *Seminole Tribe* awakened the echoes of *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), which had observed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States."

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5. The Eleventh Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

In *Alden v. Maine*, 527 U.S. 706 (1999), the Court held that the sovereign immunity of the States extends to private suits to enforce federal statutory rights in state courts. In the view of the *Alden* Court, the sovereign immunity of the States derives not from the literal language of the Eleventh Amendment, which "confirmed rather than established sovereign immunity as a constitutional principle," but from the structure of the original Constitution itself. 527 U.S. at 728-29.

The decisions of this Court have confined the doctrine of sovereign immunity to assertions of judicial power against the States. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 98 (2000) (Stevens, J. dissenting) ("*Seminole Tribe* . . . leaves open a State's liability upon enforcement of federal law by federal agencies."). The reason for restricting application of sovereign immunity to judicial proceedings would seem to be compelled by the language of the Constitution itself. The limitations in the Eleventh Amendment by its express terms rein in only the "Judicial power of the United States." This Court, however, has rejected strict reliance on the words of the Eleventh Amendment alone in defining the parameters of the States' sovereign immunity. *See Alden*, 527 U.S. at 730. This Court's analysis has been informed not only by the words of the Constitution but also by "history, practice, precedent, and the structure of the Constitution." *See id.* at 754.

2. Resort of Court of Appeals To Ahistorical Literalism

The court of appeals in this case did exactly what the *Alden* Court warned not to do — resort to an uncritical reliance on "ahistorical literalism." *See id.* at 730. The court of appeals latched onto one passage from the majority opinion in *Alden*

and converted it into an unconditional license to permit the States to invoke sovereign immunity not only in the judicial arena but also in the federal administrative arena. In *Alden* this Court recognized the existence of the presumption mentioned in *Hans v. Louisiana*, 134 U.S. 1, 18 (1890): "the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution — anomalous and unheard of when the constitution was adopted." *See Alden*, 527 U.S. at 727. What the *Hans* Court was referring to were suits and proceedings by an individual against a State — suits and actions unknown to the law, and forbidden by the law, which were not justiciable in the courts at the time the Constitution was adopted because they were brought against a sovereign. *See* 134 U.S. at 15.

The court of appeals in this case interpreted this passage from *Hans* not from the perspective of the Nineteenth Century author of the opinion but from the perspective of a Twenty-First Century reader. While Justice Bradley in referring to "proceedings or suits" meant those in equity or at law that could only be brought in a judicial forum, Chief Judge Wilkinson of the Fourth Circuit read the same disjunctive phrase as distinguishing "suits," which could be brought only in courts of law, from "proceedings," which were not suits and presumably could be brought before any adjudicatory body (Pet. App. 8a). Judge Wilkinson thus viewed *Alden* as sufficient authority for the holding that "sovereign immunity bars not just lawsuits filed in courts of law, but rather *all* proceedings against a non-consenting sovereign." (Pet. App. 8a) (emphasis added). The court of appeals adopted this expansive definition of the States' sovereign immunity without subjecting its formulation to the enlightenment of "history, practice, precedent, and the structure of the Constitution." When the appropriate calculus is applied, the invalidity of the formulation of the court of appeals becomes evident.

3. Lack of Support For Decision Below In Precedent, History, Or Practice

Neither precedent, history, nor practice supports the decision of the court of appeals. The rule of decision by the court of appeals is not only unprecedented but mischievous. It places in jeopardy the continued vitality of enforcement mechanisms that have in practice formed the backbone of the federal regulatory system. Many federal enactments contain administrative procedures that enable private litigants to commence complaint proceedings before federal agencies to obtain redress for violations of the substantive provisions of these federal statutes. Private litigants are the agencies' eyes and ears. These private parties bring to the agencies' attention possible infringements of federal law that would otherwise go undetected if enforcement were to depend solely upon the limited resources of the agencies themselves. Indeed, in its decision in this case, Petitioner FMC explained that its "jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports." (Pet. App. 33a).

Historically, private complaint proceedings against state instrumentalities involved in activities subject to federal regulation have been a staple of administrative law. This is particularly true before Petitioner FMC. Almost a half century ago this Court held that state instrumentalities by virtue of their operation of marine terminal facilities are "persons" subject to regulation under federal shipping statutes. *See California v. United States*, 320 U.S. 577, 585-86 (1944). Indeed, over the years Respondent SCSPA and its counterparts in other ports have been brought before the FMC in complaint proceedings commenced by private parties to redress alleged shipping law violations by these state

instrumentalities.[6] At no time prior to this case was there ever any question raised that this type of administrative proceeding was an impermissible infringement of the instrumentalities' sovereign immunity.

It has always been a fact of life in the shipping industry that state port authorities engaged in the business of marine terminal operations subject to the shipping laws of the United States must defend complaint proceedings brought against them before the FMC. Indeed, for the first 37 years of SCSPA's existence, from its formation in 1962 until 1999, there was never any doubt voiced by SCSPA as to this regulatory obligation. In 1999, however, the SCSPA amended

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6. *See Ryan Walsh, Inc. v. Port of Houston Auth.*, No. 97-16, Approval of Settlement (FMC ALJ Apr. 30, 1998), *available at http://www.fmc.gov/dockets/97-16ABC.htm; Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 27 Shipping Reg. Rep. (P&F) 1251 (FMC 1997), *remanded*, 1998 U.S. App. LEXIS 25733 (4th Cir. 1998); *James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 27 Shipping Reg. Rep. (P&F) 1123 (FMC 1997); *Pate Stevedore Co. of Mobile v. Alabama State Docks Dep't*, 24 Shipping Reg. Rep. (P&F) 657 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 1221 (FMC 1989); *Palmetto Shipping & Stevedoring Co. v. Georgia Ports Auth.*, 24 Shipping Reg. Rep. (P&F) 50 (I.D.), *adopted*, 24 Shipping Reg. Rep. (P&F) 761 (FMC 1988); *Harrington & Co. v. Georgia Ports Auth.*, 23 Shipping Reg. Rep. (P&F) 753 (I.D.), *adopted* , 23 Shipping Reg. Rep. (P&F) 1276 (FMC 1986); *Southeastern Mar. Co. v. Georgia Ports Auth.*, 23 Shipping Reg. Rep. (P&F) 530 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 941 (FMC 1986); *Stevens Shipping & Terminal Co. v. South Carolina State Ports Auth.*, 23 Shipping Reg. Rep. (P&F) 267 (I.D.), *adopted*, 23 Shipping Reg. Rep. (P&F) 684 (FMC 1985); *South Carolina State Ports Auth. v. Georgia Ports Auth.*, 22 Shipping Reg. Rep. (P&F) 1111 (FMC 1984); *United States Lines v. Maryland Port Admin.*, 23 F.M.C. 441 (1980); *Bethlehem Steel Corp. v. Indiana Port Comm'n*, 21 F.M.C. 629 (1979).

the terminal tariff it files with the FMC governing the terms and conditions SCSPA sets for use of the marine terminals it operates in South Carolina to include an express choice of forum clause. The amendment provides that every person utilizing SCSPA's marine terminals consents to the jurisdiction of the South Carolina state courts in any actions against the SCSPA arising from the terminal services the Authority furnishes except for "actions brought pursuant to Acts of the Congress of the United States that expressly designate the jurisdiction in which such actions should be brought and from which the Authority would not have sovereign or eleventh amendment immunity." SCSPA's Terminal Tariff No. FMC-T No. 8, Rule 34-021 (effective Jan. 6, 1999), *available at http://www.port-of-charleston. com.* While the tariff amendment contains an implicit recognition that SCSPA is answerable in those tribunals designated by Congress, which in the case of state-operated marine terminals, like SCSPA, undoubtedly mean the Federal Maritime Commission, the amendment for the first time in SCSPA's history invokes the concept of sovereign or Eleventh Amendment immunity as a possible impediment to the exercise of jurisdiction by that congressionally designated tribunal.

The intrusion of the doctrine of sovereign immunity into the federal regulatory regime is hindering the enforcement of other federal statutes besides the shipping acts. The enforcement of "whistleblower" provisions enacted by Congress in federal environmental statutes has been affected.[7] Within the last year

7. 15 U.S.C.A. § 2622 (West 1998) (Toxic Substance Control Act); 33 U.S.C.A. § 1367 (West 1986) (Water Pollution Prevention & Control Act); 42 U.S.C.A. § 300j-9(i) (West Supp. 2001) (Safe Drinking Water Act); 42 U.S.C.A. § 5851 (West 1995) (Energy Reorganization Act); 42 U.S.C.A. § 6971 (West 1995) (Solid Waste Disposal Act); 42 U.S.C.A. § 7622 (West 1995) (Clean Air Act); (Cont'd)

and a half, four federal district courts, including one that relied heavily on the decision of the court of appeals in this case, invoked the sovereign immunity doctrine to bar federal administrative proceedings commenced by whistleblowers seeking recourse for retaliatory or discriminatory actions taken against them by their state employers.[8] Administrative proceedings before the Executive Office For Immigration Review by employees seeking recourse under the Immigration Reform and Control Act, 8 U.S.C.A. § 1324a (West 1999 & Supp 2001), for citizenship-based employment discrimination by state instrumentalities have been outlawed by the United States Court of Appeals for the Tenth Circuit in a decision in which the court of appeals simply assumed without discussion that the administrative proceeding qualified as a lawsuit for sovereign immunity purposes. *See Hensel v. Office of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994). The Tenth Circuit's ruling has shut the door of the Executive Office For Immigration Review to victims of citizenship-based employment discrimination by state employers.[9]

(Cont'd)
42 U.S.C.A. § 9610 (West 1995) (Comprehensive Environmental Response Compensation & Liability Act).

8. *Connecticut Dept. of Environmental Protection v. OSHA*, 138 F. Supp. 2d 285 (D. Conn. 2001); *Florida v. United States*, 133 F. Supp. 2d 1280 (N.D. Fla. 2001); *Ohio Environmental Protection Agency v. United States Dept. of Labor*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000); *Rhode Island v. United States*, 115 F. Supp. 2d 269 (D. R.I. 2000).

9. *See Wong-Opasi v. Tennessee*, 2000 OCAHO LEXIS 2 (Jan. 11, 2000); *Elhaj-Chehade v. University of Texas*, 1999 OCAHO LEXIS 3 (Jan. 28, 1999); *Kupferberg v. University of Oklahoma Health Sciences Center*, 1994 OCAHO LEXIS 99 (Nov. 21, 1994).

4. Lack of Support For Decision Below In Structure of Constitution

The structure of the Constitution is antithetical to the formulation proposed by the court of appeals in this case. Dual sovereignty requires a balancing of state and federal powers. Congress may not exercise its delegated powers "to infringe on certain fundamental aspects of state sovereignty that are essential to 'the States' separate and independent existence.' " *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579 (1985) (Rehnquist, J., dissenting). "In other words, the two governments — national and state — are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers." *South Carolina v. United States*, 199 U.S. 437, 452 (1905).

The decision of the court of appeals in this case has nationwide ramifications that threaten the traditional enforcement mechanisms of federal regulation. Extending the reach of state sovereign immunity to administrative proceedings permits state entities to violate federal law with impunity. Whistleblowers and other employees will be vulnerable to discharge and employment discrimination for which they have no relief. This lack of personal recourse hardly encourages the reporting by state employees of violations of federal environmental law. By the same token the members of the *amici curiae* submitting this brief will be virtually powerless to vindicate their shipping law rights against state port authorities, which act not as governmental regulators but as private entrepreneurs. The suggestion that the federal agencies themselves can effectively compel

compliance by state instrumentalities with federal law[10] suffers from an overly optimistic appraisal of the capabilities and resources of federal regulatory bodies. *See Alden v. Maine*, 527 U.S. 706, 810 (1999) (Souter, J., dissenting).

Permitting state instrumentalities to invoke immunity in federal administrative proceedings severely impinges upon the effective furtherance of legitimate federal interests. It interferes with the mission entrusted to the federal government in the plan of the convention. By the same token, subjecting state instrumentalities engaged in commercial activities that fall within the objects committed by the Constitution to the federal government's regulation under applicable federal law by duly constituted federal regulatory agencies does not interfere with the sovereign powers retained by the States: fire prevention, police protection, sanitation, and public health, and similar public services "remote from any normal concept of interstate commerce [but] . . . traditional governmental functions . . . engaged in by state and local governments that affect the everyday lives of citizens." *Garcia*, 469 U.S. at 575 (Powell, J., dissenting).

What subjecting state commercial instrumentalities to regulation by federal agencies under federal law does do is confirm and give effect to the longstanding understanding of all those private and governmental commercial enterprises operating within the realm of federal regulation that state sovereign immunity has never sanctioned special treatment for state commercial instrumentalities. The mark of effective

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10. The doctrine of state sovereign immunity does not shield the States from suits brought by the federal government. *Alden v. Maine*, 527 U.S. 706, 755-56 (1999); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934); *United States v. Texas*, 143 U.S. 621, 644-45 (1892).

regulation is evenhandedness. State commercial entities and private market participants expect a level playing field where they are subjected to the same regulatory obligations, including the need to respond to complaints before federal regulators for alleged violations of federal law.

> When a State engages in ordinary commercial ventures, it acts like a private person, outside the area of its "core" responsibilities, and in a way unlikely to prove essential to the fulfillment of a basic governmental obligation. A Congress that decides to regulate those state commercial activities rather than to exempt the State likely believes that an exemption, by treating the State differently from identically situated private persons, would threaten the objectives of a federal regulatory program aimed primarily at private conduct.

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 694-95 (1999) (Breyer, J. dissenting) (citations omitted).

The constitutional grant of sovereignty to the federal government over maritime commerce was not conditional. The power to regulate includes the adoption of not only substantive law but also appropriate remedies and procedures essential to the fulfillment of the regulatory objectives embodied in the substantive provisions. By engaging in the profit-making operation of marine terminals in their ports, the States implicitly surrender their sovereignty and submit to the regulatory sovereignty over maritime commerce they granted exclusively to the federal government in the constitutional compact. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991).

Inherent in this submission to the sovereignty of the federal government is the acceptance of the regulatory rules both substantive and procedural enacted by the Federal Sovereign. That the regulatory regime includes having to defend complaint proceedings brought by private persons does not constitute coercive and disrespectful overriding of the sovereign immunity of the States. The state commercial instrumentality in this case voluntarily chose to engage in an enterprise which it well knew fell within the regulatory sovereignty of the federal government. To submit to the regulatory jurisdiction of the Federal Maritime Commission, the agency entrusted by Congress with the enforcement of federal shipping laws, is perfectly consistent with the constitutional plan, which South Carolina and all the other States have ratified.

CONCLUSION

The novel extension by the court of appeals in this case of the States' sovereign immunity doctrine to administrative proceedings before federal agencies imposes a constitutionally unwarranted burden upon the federal regulatory system. Principles of federalism implicit in our system of dual sovereignty bind the States to the sovereignty they granted to the federal government. Requiring state commercial port authorities to defend complaint proceedings brought by private persons before the federal agency entrusted by Congress with the enforcement of federal shipping law does not infringe on the States' traditional, core governmental functions but furthers the federal regulation of commerce consistent with the constitutional plan approved by the States. Accordingly, the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit should be reversed, and the case remanded to Petitioner Federal Maritime Commission for disposition of the merits of the administrative complaint filed against Respondent South Carolina State Ports Authority.

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IN THE

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FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether constitutional principles of state sovereign immunity preclude the Federal Maritime Commission from adjudicating a private party cause of action against a state agency for an alleged violation of the Shipping Act of 1984.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
CONSTITUTIONAL PRINCIPLES OF SOVEREIGN IMMUNITY PROHIBIT CONGRESS FROM SUBJECTING STATE AGENCIES TO CLAIMS BY PRIVATE PERSONS IN FEDERAL ADMINISTRATIVE TRIBUNALS	5
I. THE PURPOSES OF THE STATES' CONSTITUTIONAL IMMUNITY FROM SUIT APPLY FULLY TO CLAIMS LITIGATED IN ADMINISTRATIVE TRIBUNALS	6
II. CONSTITUTIONAL PRINCIPLES OF STATE SOVEREIGN IMMUNITY BAR THE FEDERAL MARITIME COMMISSION FROM ADJUDICATING A PRIVATE PARTY CAUSE OF ACTION AGAINST A STATE	12
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

	Page
Alden v. Maine, 527 U.S. 706 (1999)	*passim*
Ardestani v. INS, 502 U.S. 129 (1991)	13, 14, 22
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)	7, 9, 27
Board of Trustees of the Univ. of Ala. v. Garrett, 121 S.Ct. 955 (2001)	1
Butz v. Economou, 438 U.S. 478 (1978)	19
Chevron, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	26
Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)	8
City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997)	24
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)	15
College Savings Bank v. Florida Prepaid Postsec. Ed. Exp. Bd., 527 U.S. 666 (1999)	15, 27, 28
Dugan v. Rank, 372 U.S. 609 (1963)	14-15
Ex parte Bakelite Corp., 279 U.S. 438 (1929)	22
Ex parte New York, 256 U.S. 490 (1921)	8, 9, 13, 28
Franchise Tax Bd. of Cal. v. United States Postal Serv., 467 U.S. 512 (1984)	3, 16, 17
Hans v. Louisiana, 134 U.S. 1 (1890)	8, 9
Hensel v. Office of Chief Administrative Hearing Officer, 38 F.3d 505 (10th Cir. 1994)	13-14, 14, 14-15
Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997)	10
In re Ayers, 123 U.S. 443 (1887)	2, 10
Johansen v. United States, 343 U.S. 427 (1952)	22-23
Johnson v. Zerbst, 304 U.S. 458 (1938)	27
Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949)	14-15
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	21

TABLE OF AUTHORITIES—Continued

	Page
Mizokami v. United States, 414 F.2d 1375 (Ct. Cl. 1969)	25
Mt. Healthy Bd. of Ed. v. Doyle, 429 U.S. 274 (1977)	12
Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)	26
Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856)	27
Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993)	10, 25
Principality of Monaco v. Mississippi, 292 U.S. 313 (1934)	7, 9
Ristow v. South Carolina Ports Authority, 58 F.3d 1051 (4th Cir. 1995)	12
Rust v. Sullivan, 500 U.S. 173 (1991)	5, 26
SEC v. Chenery Corp., 332 U.S. 194 (1947)	26
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)	1, 12, 25, 28
Smith v. Reeves, 178 U.S. 436 (1900)	9
Thomas v. Union Carbide Agr. Prod. Co., 473 U.S. 568 (1985)	27
United States v. Texas, 143 U.S. 621 (1892)	24, 29
Upshur County v. Rich, 135 U.S. 467 (1890)	16
Weston v. City of Charleston, 27 U.S. (2 Pet.) 449 (1829)	15

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND RULES

U.S. Const. Art. II, § 1	29
U.S. Const. Art. II, § 3	28, 29
U.S. Const. Art. III, § 2	28
Equal Access to Justice Act 5 U.S.C. § 504	14

TABLE OF AUTHORITIES—Continued

5 U.S.C. § 504(a)(1) 14
5 U.S.C. § 504(b)(1)(D) 14
5 U.S.C. § 504(c)(2) 14
28 U.S.C. § 2412 14
Federal Employee Compensation Act, 5 U.S.C. §§ 8101-8152 23
Immigration Reform and Control Act
18 U.S.C. § 1324b 14
5 U.S.C. § 554(d) 19
5 U.S.C. § 554(d)(2) 19
28 U.S.C. § 2509(a) 22, 25
46 U.S.C. App. § 1709(d)(4) 26
46 U.S.C. App. § 1710(g) 3, 17, 18
46 U.S.C. App. § 1710(h)(1) 6, 28
46 U.S.C. App. § 1712(a) 4, 23
46 U.S.C. App. § 1712(e) 23
46 U.S.C. App. § 1713 23
46 C.F.R. § 502.61(a) 18
46 C.F.R. § 502.62(a) 18
46 C.F.R. § 502.64(a) 19
46 C.F.R. § 502.64(b) 20, 23
46 C.F.R. § 502.64(d) 19
46 C.F.R. § 502.71 19
46 C.F.R. § 502.94(a)(1) 20
46 C.F.R. § 502.131 20
46 C.F.R. § 502.132(a) 20
46 C.F.R. § 502.146 19
46 C.F.R. § 502.147(a) 19
46 C.F.R. § 502.149 19
46 C.F.R. § 502.164 20
46 C.F.R. §§ 502.201-207 20
46 C.F.R. § 502.210(a) 20, 23
46 C.F.R. § 502.210(a)(1)-(3) 20
46 C.F.R. § 502.221(b) 20-21

TABLE OF AUTHORITIES—Continued

Page

46 C.F.R. § 502.221(d) 20-21
46 C.F.R. § 223 21
46 C.F.R. § 502.227(a)(1) & (2) 21
46 C.F.R. §§ 502.301-305 21
46 C.F.R. §§ 502.311-321 21
FMC Complaint Form, Exhibit No. 1 To Subpart E, 46 C.F.R. § 502.62 18
FMC Answer to Complaint Form, Exhibit 2 to Subpart E, 46 C.F.R. § 502.64 19
Fed. R. Civ. P. 3 18
Fed. R. Civ. P. 8(a) 18
Fed. R. Civ. P. 8(d) 20
Fed. R. Civ. P. 12(a)(1)(a) 19
Fed. R. Civ. P. 12(e) 19-20
Fed. R. Civ. P. 16 20
Fed. R. Civ. P. 37(b) 20
Fed. R. Civ. P. 37(b)(2) 20
Fed. R. Civ. P. 45 20
Fed. R. Civ. P. 45(c)(3)(A) 20
Fed. R. Civ. P. 52 21
Fed. R. Civ. P. 55 20

OTHER AUTHORITIES

Black's Law Dictionary (6th ed. 1990) 18
The Federalist No. 81 (Hamilton) 7, 8, 11
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U.S Department of Justice, Office of Legal Counsel, Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices, Op. Off. Legal Counsel (Aug. 17, 1992), available at http://www.usdoj.gov/olc/immigrat.21.htm 14, 15

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States. *Amici* have a compelling interest in protecting the States' sovereign prerogatives.[1]

The Court has long recognized that "each State is a sovereign entity in our federal system" and that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (quotations and citations omitted). The Court has also repeatedly reaffirmed that "Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I." *See, e.g., Board of Trustees of the Univ. of Ala. v. Garrett*, 121 S.Ct. 955, 962 (2001). The Court has further made clear that the States' constitutional immunity from litigation initiated by private parties is not limited to the category of cases specifically referred to in the text of the Eleventh Amendment. *See, e.g., Alden v. Maine*, 527 U.S. 706, 730 (1999).

Notwithstanding these fundamental principles, the Federal Maritime Commission, a federal administrative agency, asserts that it has power to adjudicate a cause of action brought by a private party against a State, in which the complainant has resource to a full range of coercive process and in which the Commission asserts the power to award monetary relief, because in its view, the States have sovereign immunity only in judicial forums. The court of appeals properly rejected this sweeping expansion of federal power which would effectively eviscerate this Court's holding in

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution towards its preparation or submission.

Seminole Tribe. As that court recognized—and the United States has itself frequently contended—the core concerns of sovereign immunity are as much offended by administrative litigation that is initiated and conducted by a private party as they are by a suit filed in a federal or state court.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. The Court has long recognized that the principle of state sovereign immunity derives from the structure and design of the Constitution. The Constitution recognizes that the States are sovereign entities that retain substantial powers with the dignity inhering in that status and rejects "the concept of a central government that would act upon and through the States." *Alden v. Maine*, 527 U.S. 706, 714 (1999) (internal quotations and citations omitted). The Court has thus repeatedly held that the scope of the States' constitutional immunity from suit is not limited by the literal terms of the Eleventh Amendment and preserves the States' traditionally immunity from suit except where there is compelling evidence that the States surrendered their immunity as part of the constitutional plan. This immunity protects the States from "the indignity" of being subjected "to the coercive process of judicial tribunals at the instance of private parties," *In re Ayers*, 123 U.S. 443, 505 (1887), as well as their fiscal integrity. The immunity's protections are violated whenever a State is forced into litigation by private parties, "regardless of the forum." *Alden*, 527 U.S. at 749.

2. Notwithstanding that the Federal Maritime Commission has substantial powers to obtain a State's compliance with federal law, the Commission asserts the power to adjudicate a private complaint proceeding brought against a State which seeks, *inter alia*, monetary relief. In support of this sweeping

expansion of federal power, the Commission and the United States contend that the protections of sovereign immunity are limited to those disputes which are litigated in judicial tribunals. The United States' contention, however, is belied by its own frequent assertions of sovereign immunity in administrative proceedings. Moreover, the Commission's and the United States' attempt to limit the scope of the States' constitutional immunity to the proceedings described in the text of the Eleventh Amendment has been repeatedly rejected by this Court as "ahistorical literalism." *Alden*, 527 U.S. at 730. As the Court has explained, "the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Id*. at 736. In any event, the word "suit" is a generic term which encompasses administrative litigation. *See Franchise Tax Bd. of Cal. v. United States Postal Serv.*, 467 U.S. 512, 523-25 (1984).

3. The Shipping Act and the Commission's regulations make clear that a private complaint proceeding is a lawsuit for all intents and purposes. The claim is itself called a "cause of action," provides for the recovery of damages, interest and attorney's fees, and is subject to a three year statute of limitations. 46 U.S.C. App. § 1710(g). Moreover, under the Commission's rules—which frequently borrow verbatim from the Federal Rules of Civil Procedure—the case is litigated in the same manner as any other lawsuit. The case is assigned to an ALJ, who is required to be free from political influence and who is given broad powers over the parties and the case. The Commission's rules provide a litigant with a wide range of coercive process including the power to take depositions and request the production of documents, and provide substantial sanctions for failure to comply with discovery orders.

Upon the close of the evidence, the parties submit briefs with proposed findings and legal argument accompanied by citations of authorities. The ALJ is required to issue a decision complete with findings and conclusions of law on

the material issues and an appropriate ruling on the prayer for relief. Thus contrary to the Commission's assertion, FMC Br. 24, the proceeding has no semblance to an investigation but rather bears almost every attribute of litigation conducted in a federal district court.

4. The United States and the Commission overlook the fact that the purpose of the proceeding is to impose monetary liability on the state respondent and that the complainant is given authority under the rules to invoke a full range of coercive process. Instead, they contend that because the Commission lacks the contempt power and thus cannot enforce its own orders the proceeding is less of an affront to the State's dignitary interests or a threat to its fiscal integrity.

Sovereign immunity, however, has always been understood as barring litigation of a claim even if a court lacks the power to award an enforceable judgment. Moreover, no court has ever held that the United States is barred from raising a sovereign immunity defense in an administrative proceeding because an ALJ's order can only be enforced by a federal court. Furthermore, Congress has granted the Commission power to assess a civil penalty of up to "$25,000 for each violation" of a Commission order, with "[e]ach day of a continuing violation constitut[ing] a separate offense." 46 U.S.C. App. § 1712(a). Unlike a reparations order which can only be enforced by the complainant, the United States can seek enforcement of a civil penalty order in federal court. Thus, while the Commission cannot levy directly on the State's property, it can subject the State to substantial monetary penalties if it does not comply with a reparations order. A State thus faces the Hobson's choice of paying either reparations or civil penalties which accumulate on a daily basis. It is thus error to suggest that the FMC's adjudication of liability "does not pose the same threat to the State's financial integrity as a comparable exercise of jurisdiction by a federal court." U.S. Br. 21.

That the litigation occurs in an Article II agency, which unlike a federal court has a program interest in administering a statutory scheme, actually buttresses the State's claim to immunity. An administrative agency is given broad discretion to "adapt [its] rules and policies to the demands of changing circumstances." *Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (other citations and quotations omitted). The Commission is thus not bound to follow its own precedents in an adjudication in the way a district court is required to adhere to case law under principles of *stare decisis*. While civil litigation in the courts can raise the possibility of unpredictable retroactive liability, the Commission's assertion of jurisdiction over privately prosecuted complaints seeking reparations raises a much greater risk of unforeseen monetary liability. The need for sovereign immunity is thus greater in federal agency adjudication than it is in the courts. And it is simply illogical to suggest that the States, in creating the Union, retained immunity in the courts but surrendered it with respect to federal administrative agencies.

ARGUMENT

CONSTITUTIONAL PRINCIPLES OF SOVEREIGN IMMUNITY PROHIBIT CONGRESS FROM SUBJECTING STATE AGENCIES TO CLAIMS BY PRIVATE PERSONS IN FEDERAL ADMINISTRATIVE TRIBUNALS

As an initial matter, it is important to recognize what this case does not involve. Contrary to the Federal Maritime Commission's order, its ALJ's conclusion that the Commission cannot "disregard the 11th Amendment or its related doctrine of State immunity from *private* suits" and adjudicate a reparations proceeding initiated by a private party against a state entity, Pet. App. 59a, would not "nullify the Commission's jurisdiction over state ports." *Id.* at 33a. Indeed, as

the ALJ pointed out, the Commission retains substantial means for obtaining state compliance with the requirements of federal law "other than [adjudicating] private complaints," including the power to conduct its own formal investigation, *see id.* at 60a, and seek injunctive relief in federal district court. 46 U.S.C. App. § 1710(h)(1). This case thus involves only the validity of the Commission's assertion of jurisdiction to adjudicate privately prosecuted complaints seeking monetary and prospective relief against an unconsenting State.

As explained below, even though the proceeding is litigated before an administrative tribunal, it nonetheless substantially implicates the core purposes of sovereign immunity. It disregards the dignitary interests of the States as co-sovereigns in the federal system, subjects them to coercive federal process, and exposes the States to liability for money damages. That the tribunal is placed within the executive branch does not address any of these fundamental concerns. While the Commission lacks the power to hold parties in contempt, it retains significant coercive powers which a State's officials disregard at substantial peril. As the court of appeals recognized, the contention of the United States and the Commission that Congress can subject unconsenting States to a private party "cause of action" for money damages in non-Article III tribunals is nothing less than an "end run around the Constitution." Pet. App. 13a. The judgment of the court of appeals should therefore be affirmed.

I. THE PURPOSES OF THE STATES' CONSTITUTIONAL IMMUNITY FROM SUIT APPLY FULLY TO CLAIMS LITIGATED IN ADMINISTRATIVE TRIBUNALS

This Court has held that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713

(1999). Rather, the States' immunity from suits initiated by private parties derives from two features of the Constitution's structure and design. First, the constitutional plan recognizes that the States are sovereign entities that exercise "a substantial portion of the Nation's primary sovereignty," and possess "the dignity and essential attributes inhering in that status." *Id.* at 714. Second, "even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of 'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise concurrent authority over the people.'" *Id.* (citation omitted).

Consistent with this understanding, the Court has repeatedly explained:

> "we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'"

Blatchford v. Native Village of Noatak, 501 U.S. 775, 781 (1991) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) (quoting Alexander Hamilton, The Federalist, No. 81)). And the Court has more recently reaffirmed that "the Constitution's structure, its history, and the authoritative interpretations by this Court make clear [that] the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of

the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional amendments." *Alden*, 527 U.S. at 713.[2]

For more than a century, the Court has accordingly recognized "a 'presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the constitution was adopted.'" *Alden*, 527 U.S. at 727 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). The Eleventh Amendment was drafted to overrule the Court's decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *See Alden*, 527 U.S. at 720-723; *Ex parte New York*, 256 U.S. 490, 497-98 (1921). As *Alden* explained, "[t]he text reflects the historical context and the congressional objective in endorsing the Amendment for ratification. Congress chose not to enact language codifying the traditional understanding of sovereign immunity but rather to address the specific provisions of the Constitution that had . . . formed the basis for the *Chisolm* decision." 527 U.S. at 723; *see also Ex parte New York*, 256 U.S. at 498. As the *Alden* Court further observed, "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits. As the Amendment clarified the only provisions

[2] As Alexander Hamilton wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . .

The Federalist No. 81, at 487 (C. Rossiter ed. 1961) (quoted in *Alden*, 527 U.S. at 716-17).

of the Constitution that anyone had suggested might support a contrary understanding, there was no reason to draft with a broader brush." 527 U.S. at 724.

Thus, notwithstanding the literal text of the Eleventh Amendment, the Court has held that the States' constitutional immunity from suit prohibits citizens from suing their own State. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The immunity also bars a suit against a State brought by a federal corporation, *Smith v. Reeves*, 178 U.S. 436, 448 (1900), a foreign nation, *Principality of Monaco*, 292 U.S. at 330, and an Indian tribe. *Blatchford*, 501 U.S. at 782. The Court has further held that the State's immunity bars proceedings in admiralty notwithstanding the Eleventh Amendment's reference to "suits in law or equity." *See Ex parte New York*, 256 U.S. at 497-501. And in *Alden*, the Court rejected as "ahistorical literalism" an approach which, relying on the Amendment's reference to "[t]he Judicial power of the United States," attempted to limit the scope of the States' immunity from private party suits for money damages to the federal courts alone. 527 U.S. at 730.

In *Alden*, the Court reiterated that Congress lacks power under Article I to subject States to suits for money damages in their own courts. *See id.* at 730-754. There the Court explained that the "bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Id.* at 736. Turning to the question of whether Congress has power under Article I to abrogate the States' immunity from suit, the Court provided numerous reasons why such suits are not "consistent with the structure of the Constitution." *Id.* at 748. As *Alden* states, "[a]lthough the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Id.*

Central to the Court's reasoning was its conclusion that such suits would nullify the core protections of sovereign immunity. As the Court observed, "[t]he founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Id.* (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). "The very object and purpose" of the States' sovereign immunity is "to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U.S. at 505. *Accord Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. at 505); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (state sovereign immunity "is designed to protect" the "dignity and respect" owed the States as members of the Union).

"The principle of sovereign immunity preserved by [the] constitutional design 'thus accords the States the respect owed them as members of the federation.'" *Alden*, 527 U.S. at 748-49 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146). And because the States' constitutional immunity is an "immunity from suit," *see, e.g.*, *Alden*, 527 U.S. at 748-50, 754, its protections are violated whenever a State is forced into litigation by private parties "regardless of the forum." *Id.* at 749; *see also Puerto Rico Aqueduct*, 506 U.S. at 146 n.5 (The States' immunity "is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued.").

The other principal purpose of sovereign immunity doctrine is protecting the States' fiscal integrity. As *Alden* explains, "[p]rivate suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States." 527 U.S. at 750. Protecting the States from suits over their war debts was a major concern

of the framers.[3] "Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and leverage over the States that is not contemplated by our constitutional design." *Alden*, 527 U.S. at 750.

As the Court further observed, "[a] general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Id.* at 750-51. "[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Id.* at 751. A State cannot possibly provide full redress of every call on the State's resources, whether it be the "legitimate claim" of a judgment creditor or the demands of political constituencies. *Id.* As the Court concluded, "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Id.*

The Commission proceeding at issue in this case raises this concern in the most fundamental way. Here, the complaining party sued the State before the Commission seeking, *inter alia*, money damages, interest and attorney's fees challenging the public policy of the State regarding gambling. Even more so than when competing claimants make legitimate demands on the State's resources, this type of case raises the disturbing

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[3] *See* Alexander Hamilton, The Federalist No. 81, at 488 (C. Rossiter ed. 1961). As Hamilton wrote, "there is no color to pretend that the State governments would, by adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *Id.*

possibility of a federal tribunal issuing an order overriding the considered policy choice made by the State's citizens through the political process. Indeed, the threat of substantial monetary liability might well prompt a State's officials to discard state policy rather than risk incurring a substantial financial obligation.

II. CONSTITUTIONAL PRINCIPLES OF STATE SOVEREIGN IMMUNITY BAR THE FEDERAL MARITIME COMMISSION FROM ADJUDICATING A PRIVATE PARTY CAUSE OF ACTION AGAINST A STATE

The South Carolina State Ports Authority is an arm of the State of South Carolina and is thus entitled to the full protection of South Carolina's constitutional immunity from suits by private parties. *See Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051, 1054-55 (4th Cir. 1995); *see also Mt. Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274, 280-81 (1977). Notwithstanding that the Federal Maritime Commission retains substantial powers to obtain the Authority's compliance with federal law, *see* discussion *supra* at 6, both the Commission and the United States seek a sweeping expansion of federal power which would effectively eviscerate this Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

As explained below, the various reasons offered by the Commission and the United States for denying the Authority the protection of its constitutional immunity in a privately prosecuted complaint proceeding amount to the same "ahistorical literalism" which the Court has repeatedly rejected. *Alden*, 527 U.S. at 730. Moreover, a privately prosecuted complaint brought before the Commission is just as offensive to the States' dignitary interests and as much a threat to the State's fiscal integrity as a suit brought in federal court. The judgment of the court of appeals should therefore be affirmed.

1. The United States and the Commission formalistically contend that a privately initiated and prosecuted complaint proceeding before the Commission "is not a suit in law or equity," and is thus outside the scope of the protections of the States' constitutional immunity. FMC Br. 23, *see* also U.S. Br. 15-17. The Commission finds it "significant that the [Eleventh] Amendment specifically uses the word 'suit,' as opposed to 'proceeding' or 'cause of action,' because it thereby confirms state immunity in terms limited to the meaning of 'suit,' and that meaning does not extend to the type of adjudication heard by the Commission." FMC Br. 23. The United States repeats the argument, stating that "[t]he Amendment's reference to 'judicial Power,' and to any 'suit in law or equity' clearly mark it as an immunity from judicial process. The term 'suit' has traditionally been used in reference to court proceedings . . . [and] has not historically encompassed administrative adjudications." U.S. Br. 15-16.

These arguments disregard that the Eleventh Amendment's text merely "reflects the historical context and the congressional objective in endorsing the Amendment for ratification." *Alden*, 527 U.S. at 723. The Court has made clear, however, that the Amendment only "address[es] the specific provisions of the Constitution that had . . . formed the basis of the Chisolm decision," *id.*, and thus "the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Id.* at 736; *see also Ex parte New York*, 256 U.S. at 497-98. Most significantly, the arguments ignore that a private complaint proceeding violates the fundamental purposes of sovereign immunity regardless of whether the case is litigated in a court or before an administrative tribunal.

Indeed, the United States' contention is belied by its own frequent assertion that its sovereign immunity protects it from claims which are litigated in administrative adjudications. *See, e.g., Ardestani v. INS*, 502 U.S. 129 (1991); *Hensel v. Office of Chief Administrative Hearing Officer*,

38 F.3d 505 (10th Cir. 1994), *see also* Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices, Op. Off. Legal Counsel (Aug. 17, 1992) (available at http://www.usdoj.gov/olc/immigrat.21.htm). In *Ardestani*, the Court upheld the United States' contention that a deportation proceeding was not within the scope of the Equal Access to Justice Act, 5 U.S.C. § 504 & 28 U.S.C. § 2412, on the ground that the statute "renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity" which "must be strictly construed in favor of the United States." 502 U.S. at 137.[4]

In *Hensel*, the United States successfully asserted that its sovereign immunity barred an administrative claim brought under the anti-discrimination provisions of the Immigration Reform and Control Act, 8 U.S.C. § 1324b. *See* 38 F.3d at 506, 509-510; *see also id.* at 507 ("Respondent[] ha[s] raised a preliminary jurisdictional question of immunity and we must first determine whether [the U.S. Department of Veterans Affairs] is *protected from suit* by the principles of sovereign immunity . . . .") (emphasis added). Observing that "sovereign immunity protects the United States against judgments that would require an expenditure from public funds, that interfere with public administration or that would 'restrain the Government from acting, or compel it to act,'" the Tenth Circuit held that "[t]he ALJ lacked jurisdiction to hear Petitioner's claim[] against" the Department of Veterans Affairs which is "protected by the doctrine[] of . . . sovereign immunity." *Id.* at 509-10 (quoting *Dugan v. Rank*, 372 U.S.

[4] Claims for attorney's fees under the statute are litigated before the "adjudicative officer of the agency" who presided over the underlying proceeding. 5 U.S.C. § 504(a)(1) & (b)(1)(D). Judicial review of the fee determination is by appeal "to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication," *id.* § 504(c)(2), and thus frequently occurs as a petition for review in the court of appeals.

609, 620 (1963) (quoting *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949))). *See also* OLC Op., at 3 ("Enforcement of the Antidiscrimination Provision against the federal government plainly would implicate the sovereign immunity of the United States. . . . The Antidiscrimination Provision authorizes ALJs to enter an order awarding back pay, which would expend itself on the Treasury, or an order requiring the hiring of individuals, which would restrain the United States Government from acting or compel it to act.").

The United States thus seeks to deny the States the same sovereign privilege which it asserts. *Cf. College Savings Bank v. Florida Prepaid Postsec. Ed. Exp. Bd.*, 527 U.S. 666, 682 (1999) (applying "the 'settled proposition' that the United States' waiver of sovereign immunity 'cannot be implied'" to state sovereign immunity case, "see[ing] no reason why the rule should be different with respect to state sovereign immunity") (other citations omitted); *cf. Alden*, 527 U.S. at 750 (noting "reluctan[ce] to conclude that the States are not entitled to a reciprocal privilege" to that of the federal government's immunity from suit in its own courts). The United States and the Commission, however, offer no compelling "reason why the rule should be different with respect to state sovereign immunity." *College Savings Bank*, 527 U.S. at 682.

2. Notwithstanding that the Court has repeatedly rejected as "ahistorical literalism" the United States' and the Commission's rigid textual approach, the United States urges that "[t]he term 'suit' has traditionally been used with reference to court proceedings." U.S. Br. 15 (citing *Weston v. City of Charleston*, 27 U.S. (2 Pet.) 449 (1829) & *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)); *see also* FMC Br. at 23 (citing *Cohens*). Both cases, however, predate the emergence of the modern administrative state and thus provide no proof—let alone compelling evidence—that the States, in

creating the Constitution, knowingly and voluntarily surrendered their sovereign immunity with respect to claims adjudicated by federal agencies.

Quite remarkably, the United States and the Commission invoke *Upshur County v. Rich*, 135 U.S. 467 (1890), as establishing that the term "suit" does not "encompass[] administrative adjudications," U.S. Br. 16, and that "the exercise of judicial power is necessary for a proceeding to properly be considered a suit." FMC Br. 23. The proceeding at issue in *Upshur County*, however, did not possess the attributes of a lawsuit. Rather, the proceeding involved an application for correction of a tax assessment on the ground of excessive valuation. *See* 135 U.S. at 467-68. The Court held that because the county court was "only authorized to determine questions of quantity, proportion, and value," the taxpayers' appeal "is not a suit." *Id.* at 477. The Court further stated, however, "that such an appeal may become a suit, if made to a court or *tribunal having power to determine questions of law and fact*, either with or without a jury, and *there are parties litigant to contest the case on the one side and the other*." *Id.* (emphasis added). The Court's opinion thus refutes the formalistic notions that the term suit "has not historically encompassed administrative adjudications," U.S. Br. 16, or "extend[ed] to the type of adjudication heard by the Commission." FMC Br. 23.

More recently, the Court rejected the contention by a federal instrumentality that a "sue and be sued" clause waiving its sovereign immunity did not extend to an administrative process issued by a state agency. *Franchise Tax Bd. of Cal. v. United States Postal Serv.*, 467 U.S. 512, 523-25 (1984). In *Franchise Tax Board*, the Postal Service refused to comply with administrative orders directing it to withhold delinquent taxes owed by several employees. *Id.* at 514. The Board then filed suit in federal court to require the Postal Service to comply with the orders. *Id.*

Before this Court, the Postal Service argued "that although it must obey a judicial order, it retains sovereign immunity with respect to state administrative tax levies" and "that while the provision that the . . . Service can 'sue and be sued in its official name' waives immunity from suit, it does not apply to administrative proceedings." *Id.* at 516. In the Postal Service's view, the statute limited the waiver of sovereign immunity "to cases in which it has been 'sued,' and . . . that because the process that has issued here is that of an administrative agency rather than a court, the Service ha[d] not been 'sued.'" *Id.* at 521.

The Court rejected the argument, describing it as a "crabbed construction" and "illogical." *Id.* at 521-22. According to the Court, the administrative assessment "operate[d] in a way that is functionally indistinguishable from the judgment of a court of law" as "it creates an absolute legal obligation to make payment by a date certain," which the taxpayers could not dispute until they paid the tax and filed a refund suit. *Id.* at 523. Noting the "'incoherence'" of "distinguish[ing] between administrative and judicial process," the Court held that the clause waived the United States' sovereign immunity. *Id.* at 524 (citation omitted). As the Court concluded, "when administrative process of the type employed by the Board issues against the Postal Service, it has been 'sued' . . . and must respond to that process." *Id.* at 525.

As the foregoing demonstrates, the word "suit" is a generic term which encompasses more than just court proceedings and includes the Federal Maritime Commission's private party complaint procedure. Indeed, in the provision of the Shipping Act which creates the right to reparations, Congress itself described the right as a "cause of action." 46 U.S.C. App. § 1710(g). Contrary to the Commission's semantic contention that the term "suit" has a different meaning than "cause of action," *see* FMC Br. 23, the terms are in fact

synonymous. *See Black's Law Dictionary* 221 (6th ed. 1990) (defining "cause of action" as "[t]he fact or facts which give a person a right to judicial redress or relief against another" and "[a] situation or state of facts which would entitle party to sustain action and give him right to seek a judicial remedy in his behalf").

Indeed, both the statute creating the right and the Commission's regulations establish that the proceeding is a lawsuit for all intents and purposes. The reparations "cause of action" is subject to a three year statute of limitations and provides for the recovery of damages for "actual injury . . . includ[ing] the loss of interest at commercial rates compounded from the date of injury . . . plus reasonable attorney's fees." 46 U.S.C. App. § 1710(g). The imposition of monetary liability is thus a potential outcome—if not the primary purpose—of the proceeding.

Moreover, the Commission's regulations establish that a private complainant and the ALJ who presides over the case have a wide range of coercive process available. Indeed, under the Commission's rules—which frequently borrow verbatim from the Federal Rules of Civil Procedure—the case is litigated in essentially the same manner as any other federal lawsuit.

The "[p]roceedings are commenced by the filing of a complaint," 46 C.F.R. § 502.61(a), which "must be verified" and contain "a concise statement of the cause of action, and a request for the relief or other affirmative action sought." *Id.* § 502.62(a); *Cf.* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.") & *id.* R. 8(a) ("A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief, and . . . a demand for judgment for the relief the pleader seeks."); *see also* FMC Complaint Form, Exhibit No. 1 To Subpart E [§ 502.62].

Thereafter the case is assigned to an administrative law judge, *see* 46 C.F.R. § 502.146, who is subject to disqualification for "personal bias," *id.* § 502.149, and who "may not . . .be . . subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for" the Commission. 5 U.S.C. § 554(d) & (d)(2). The ALJ is given a wide range of powers over the parties and the case, including the power to "direct witnesses to testify or produce evidence" and the power to "exclude any person from a hearing for disrespectful, disorderly, or contumacious language or conduct." 46 C.F.R. § 502.147(a).[5]

The respondent must file "an answer to the complaint and . . . serve it on the complainant . . . within twenty (20) days after the date of service of the complaint." 46 C.F.R. § 502.64(a). The "answer shall give notice of issues *controverted in fact or law*." *Id.* (emphasis added). Moreover, "[r]ecitals of material . . . facts in a complaint . . . unless specifically denied in the answer thereto" are "deemed admitted as true." *Id.*; *see also* FMC Answer to Complaint Form, Exhibit 2 To Subpart E [§ 502.64]. The respondent may also file "a counter-complaint," *id.* § 502.64(d), or a motion "for a more definite statement." *Id.* § 502.71. *Cf.* Fed. R. Civ. P. 12(a)(1)(a) (requiring filing of answer "within 20 days after being served with the summons and complaint") & (e) (authorizing a party to "move for a more definite

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[5] As the Court observed in *Butz v. Economou*, 438 U.S. 478, 513 (1978), where it held that administrative law judges are entitled to absolute immunity in the same manner as Article III judges, "[t]he conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court." As the Court further explained, "the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions." *Id.*

statement"); *see also id.* R. 8(d) ("Averments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleading."). In the event that a respondent "fail[s] to file and serve the answer within the time provided, the [ALJ] may enter such rule or order as may be just." 46 C.F.R. § 502.64(b). *Cf.* Fed. R. Civ. P. 55.

Like Fed. R. Civ. P. 16, the Commission's rules provide for a "prehearing conference" for "the purpose of considering any settlement," as well as to consider the "[s]implification of the issues," "[t]he necessity or desirability of amendments to the pleadings," and "[t]he possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof." 46 C.F.R. § 502.94(a)(1). The Commission's rules provide for a wide range of discovery, including depositions, interrogatories, requests for production of documents, requests for admissions, *see id.* §§ 502.201-207, and various sanctions for "failure to comply" with discovery orders. *Id.* § 502.210(a); *cf.* Fed. R. Civ. P. 37(b). These sanctions include deeming facts "to be established," prohibiting "the disobedient party [from] support[ing] or oppos[ing] desiginated claims or defenses," "striking out pleadings or parts thereof," "dismissing the action," "or rendering a judgement by default against the disobedient party." *Id.* § 502.210(a)(1)-(3); *cf.* Fed. R. Civ. P. 37(b)(2).

The Commission's rules further allow any party to request that the ALJ issue a subpoena to compel either the testimony of a witness or the production of documents. *See* 46 C.F.R. § 502.131; *cf.* Fed. R. Civ. P. 45. "[T]he person to whom the subpena is directed" may move "to quash or modify the subpena." 46 C.F.R. § 502.132(a); *cf.* Fed. R. Civ. P. 45(c)(3)(A).

Finally, "at the close of testimony" the ALJ may order "[o]ral argument." 46 C.F.R. § 502.164. The parties file initial briefs which "shall be served upon all parties" and which "shall contain . . . proposed findings of fact in serially

numbered paragraphs with reference to exhibit numbers and pages of the transcript, . . . argument based upon principles of law with appropriate citations of the authorities relied upon, and . . . conclusions." *Id.* § 502.221(b) & (d). The ALJ then issues a decision which must "include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues presented on the record, and the appropriate rule, order, sanction, relief, or denial thereof." *Id.* § 502.223; *cf.* Fed. R. Civ. P. 52. Thereafter, a "party may file a memorandum excepting to any conclusions, findings, or statements contained in such decision, and a brief in support of such memorandum," and an "adverse party may file and serve a reply to such exceptions." 46 C.F.R. § 502.227(a)(1) & (2). The Commission even has two sets of rules pertaining to its adjudication of small claims. *Id.* §§ 502.301-502.305; 502.311-502.321.

As the forgoing demonstrates, the Commission's assertion that "[a] private cause of action . . . brought before an administrative agency . . . is in many respects more analogous to a Federal [agency] investigation than it is to a suit brought by a private party before a Federal or state court," FMC Br. 24 (quoting Pet. App. 34a), "is too extravagant to be maintained." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803). The private party does not simply file the complaint and stand by while the Commission conducts an investigation; rather, it retains full responsibility for prosecuting a cause of action that bears almost every attribute of litigation conducted in a federal district court. As the court of appeals recognized, "[t]he proceeding . . . walks, talks, and squawks very much like a lawsuit. Its placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication." *Id.* at 15a.

3. The United States and the Commission both downplay the fact that the purpose of the private complaint proceeding is to impose a monetary liability on the respondent and that the complainant is given authority under the Commission's

rules to use a full range of coercive process. Instead, they point to the Commission's lack of power to award execution, *see* Br. U.S. 18-19, or to compel obedience to its orders by holding a disobedient party in contempt, *see id.* at 19-21; *see also* FMC Br. 21-23, suggesting that the absence of such power renders the proceedings less of an affront to the States' dignitary interests or threat to the State's fisc. This argument fails on several counts.

First, the protection of sovereign immunity does not apply only in those forums that have authority to enforce their own orders or hold a party in contempt. Taken to its logical conclusion, the views of the United States and the Commission would allow Congress to subject a State to suit in an inferior court as long as that court lacked the power to award an enforceable judgment. Congress could, for example, subject States to litigation over moral claims. *See, e.g.*, 28 U.S.C. § 2509(a) (providing for Claims Court jurisdiction over reference proceedings). But it has always been understood that a claimant cannot bring a proceeding to establish the validity of such a claim absent government consent. *Cf. Ex parte Bakelite Corp.*, 279 U.S. 438, 453-54 (1929) (noting that "[t]he government cannot be sued, except with its own consent" and that Congress required the former Court of Claims "to give merely advisory decisions on many matters").

Second, the United States has routinely asserted that its sovereign immunity bars claims against it which are litigated in administrative proceedings. *See* discussion *supra* at 13-15. For example, an ALJ who awards a prevailing party attorney's fees under the EAJA lacks authority to award execution or to hold the agency in contempt if it fails to pay. No court has ever held, however, that the federal government is barred from raising a sovereign immunity defense in an administrative proceeding because the order, in the event the officials refuse to pay, can only be enforced by a federal court. *See, e.g., Ardestani*, 502 U.S. at 137; *see also Johansen v. United States*, 343 U.S. 427, 439 (1952)

(describing Federal Employee Compensation Act, now codified at 5 U.S.C. §§ 8101-8152, which is administered by the Secretary of Labor and provides for the award of monetary relief, as "a legislative breach in the wall of sovereign immunity to damages claims").

Most important, the argument ignores the significant consequences which attach when a party disregards either a process issued under the authority of the Commission's rules or the Commission's own orders. A party which fails to answer a complaint risks the entry of an order finding it in default. *See* 46 C.F.R. § 502.64(b). A party which fails to comply with a Commission subpena or other discovery order subjects itself to a wide range of sanctions including, *inter alia*, an order deeming facts to be admitted, disallowing defenses, drawing adverse inferences, and even entering "a judgement by default." *Id.* § 502.210(a). Furthermore, a party which fails to respond to a subpoena or discovery order risks being hauled by the Attorney General before the federal district court. *See* 46 U.S.C. App. § 1713. Finally, Congress has granted the Commission the power to assess a civil penalty of up to "$25,000 for each violation" of a Commission order with "[e]ach day of a continuing violation constitut[ing] a separate offense." 46 U.S.C. App. § 1712(a). Unlike a reparations order which can only be enforced by the complainant, *see* U.S. Br. 6, a civil penalty assessment can be enforced by the United States and the court is required to enforce the order "unless it finds that the order was not regularly made or duly issued." *See* 46 U.S.C. App. § 1712(e).

In light of the foregoing, it is irrelevant whether a private party can bring an action in federal district court to enforce an FMC order directing that a State pay reparations, a point on which the United States and the Commission disagree. *Compare* U.S. Br. 21 (asserting that state sovereign immunity would bar a private suit to enforce a reparations award) *with*

Pet. App. 36a (Commission asserts that a suit to enforce a reparations order is "not an original *suit* against a state entity implicating Article III jurisdictional authority, but instead, like Hobbs Act review in the court of appeals, is court *review* of a Federal agency's order").[6] While the Commission cannot direct its enforcement staff to levy on the State's property, it can subject the State to substantial monetary penalties if it does not comply with a reparations order. Moreover, the Attorney General's subsequent suit in federal district court to enforce the Commission's assessment of a civil penalty against a State is not barred by sovereign immunity. *See, e.g.*, *Alden*, 527 U.S. at 755-56, *United States v. Texas*, 143 U.S. 621, 644-45 (1892). A State thus faces the Hobson's choice of paying either reparations or civil penalties which accumulate on a daily basis.

It is thus erroneous to suggest that the FMC's adjudication of liability "does not pose the same threat to the State's financial integrity as a comparable exercise of jurisdiction by a federal court." U.S. Br. 21. To the contrary, it can be a *greater* threat because a State's potential liability for civil

[6] The Commission tortuously concludes that a federal district court action to enforce a reparations award is not a suit subject to the Eleventh Amendment because the agency's findings are subject to deferential review, which "like Hobbs Act review in the courts of appeals, is court *review* of a Federal agency's order." Pet. App. 36a. The district courts, however, "routinely conduct deferential review pursuant to their original jurisdiction over federal questions, including on-the-record review of federal administrative action." *City of Chicago v. International College of Surgeons*, 522 U.S. 156; 171 (1997). Deferential review of the Commission's findings and conclusions does not make such an action any less a suit. It does, however, further point to the coercive nature of the proceeding because a party which fails to respond to the complaint cannot subsequently relitigate the facts in the district court.

penalties could rapidly exceed its liability for reparations. Under such circumstances, a State's officials have no practical choice but to pay the reparations award.[7]

As the respondent party in a private complaint proceeding, a state agency is not free to disregard the Commission's process or orders. Rather, a state agency is subject to sanctions designed to coerce compliance at every stage of the litigation. Moreover, refusing to obey the Commission's orders has great political ramifications both within and without the State. Not only would such an act engender great public criticism, "a state offends an agency that has plenary jurisdiction over its ports at its own peril." Pet. App. 17a (opinion of court of appeals). Indeed, a state agency has a manifest incentive to maintain good relations with the federal officials who regulate it. The FMC's private complaint proceeding is thus just as much an affront to the State's sovereignty and threat to its fiscal integrity as a case litigated in federal district court.

4. The Commission asserts that the State should be denied immunity because the litigation occurs in an Article II agency, which unlike a federal court, has a "program interest" in administering a statutory scheme and "does not have an

[7] Even if a State's refusal to comply with a reparations order were not grounds for a civil penalty assessment, the complaint proceeding would still violate the State's immunity. The immunity is not simply a defense to damages liability; "it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe*, 517 U.S. at 58 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146). Moreover, absent waiver, sovereign immunity bars a proceeding even if it would establish only that the sovereign has a moral obligation to pay. *See, e.g., Mizokami v. United States*, 414 F.2d 1375, 1377 (Ct. Cl. 1969). For example, a party with a moral or equitable claim against the United States is nonetheless barred from litigating that claim absent a congressional reference to the Court of Federal Claims. *See* 28 U.S.C. § 2509(a); *Mizokami*, 414 F.2d at 1377, 1379.

exclusively judicial role." FMC Br. 21, 22; *see also* U.S. Br. 22-24 (discussing differing roles of courts and agencies). The argument, however, actually buttresses the State's position.

Without question, an agency cannot be expected to predict in advance every problem that may arise in the course of administering a statutory scheme. The Court has thus recognized as a general matter that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). The Court has further held that an agency has broad discretion to "'adapt [its] rules and policies to the demands of changing circumstances.'" *Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (other citation and internal quotation omitted)); *see also Chevron, Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The FMC is thus not bound to follow its own precedents in an adjudication in the same way a district court is required to adhere to case law under principles of *stare decisis*.

While civil litigation in the courts can raise the possibility of unpredictable retroactive liability, the Commission's assertion of jurisdiction over privately prosecuted complaints seeking reparations raises a much greater risk of unpredictable monetary liability. As the Commission explains, its "interpretations of the Shipping Act shape the continuing development of the standards applicable to the shipping industry by determining . . . what constitutes an 'unreasonable preference' or an 'unreasonable prejudice.'" FMC Br. 25 (quoting 46 U.S.C. App. § 1709(d)(4)). Put another way, these inherently ambiguous standards are likely to mean one thing to one set of Commissioners and another thing to a different set.

The need for sovereign immunity is therefore even greater in the context of federal agency adjudication than it is in the courts. It is thus simply illogical to suggest, as the Commission and United States do, that the States, in creating the Union, retained immunity in the courts but surrendered it with respect to federal administrative agencies. *See, e.g.*, FMC Br. 25-27. As the court of appeals observed, "would the founders have countenanced a system by which Congress could have avoided all the strictures of sovereign immunity by creating different tribunals where state sovereign immunity was completely inapplicable? To ask the question is to answer it." Pet. App. 12a-13a.[8]

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[8] Both the Commission and the United States make the ahistorical argument that because the administrative adjudication of a private complaint proceeding under the Shipping Act involves a "public right," which is properly committed to a non-Article III tribunal, sovereign immunity does not apply. *See* FMC Br. 34-41; U.S. Br. 17-18. That a "public right" can be adjudicated by an administrative tribunal without running afoul of Article III does not, however, establish that a State's sovereign immunity defense is foreclosed. Indeed, other than with respect to the Seventh Amendment right to a jury trial, which is clearly limited to suits at common law, the Court has never held that a federal agency adjudicating a public right is free to disregard other constitutional rights.

Furthermore, while the judicial conception of "a public right" has grown substantially from claims against the United States to include claims against a private party, *compare Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), *with Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568 (1985), the Commission and the United States overlook the fact that the framers' conception of a public right was limited to claims created by the United States against itself and did not include claims created by Congress against private parties or the States. The "effective waiver of a constitutional right [requires] the 'intentional relinquishment or abandonment of a known right or privilege.'" *College Savings Bank*, 527 U.S. at 682 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). It is thus erroneous to suggest that the States surrendered, as part of the plan of the convention, their immunity from "public rights" claims when brought in a non-Article III tribunal. *See, e.g., Blatchford*, 501 U.S. at 782. Such claims did not exist at the

That the Commission's adjudication of disputes between regulated entities is "*simply one means* by which the agency fulfills the responsibility of the Executive Branch to 'take Care that the Laws be faithfully executed,'" U.S. Br. 23 (quoting U.S. Const. Art. II, § 3) (emphasis added), begs the question of why the Commission cannot utilize other less intrusive and constitutionally proper methods to obtain a State's compliance with federal law. As its own ALJ pointed out, the Commission can conduct an investigation on its own motion or "refer the allegations" to its "Bureau of Enforcement (BOE) and await BOE's recommendations." Pet. App. 60a-61a. Moreover, "[i]n connection with any investigation . . . the Commission may bring suit in a district court of the United States to enjoin conduct in violation of" the Shipping Act. 46 U.S.C. App. § 1710(h)(1). Such a suit is, of course, contemplated by the constitutional design, *see Alden*, 527

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time of the convention. Accordingly the States could not have knowingly and intelligently surrendered their immunity from them. *Cf. College Saving Bank*, 527 U.S. at 682.

The Commission's further contention that "[t]he constitutional necessity of uniformity in the regulation of maritime commerce" justifies overriding the States' immunity from suits by private parties, FMC Br. 29-33, is likewise unpersuasive. While the need for uniformity in maritime commerce led the framers to give the federal courts cognizance of "all [c]ases of admiralty and maritime [j]urisdiction," U.S. Const. Art. III, § 2, the States retained their immunity in suits in admiralty. *See Ex parte New York*, 256 U.S. 490 (1921). Moreover, agencies such as the United States Shipping Board were not even established until early in the 1900s. The federal courts were consequently the principal institution for enforcing the norms of federal maritime law. That the States retained their immunity from suits in federal admiralty courts refutes the Commission's assertion that "the Founders would not have countenanced a claim of state immunity from any aspect of the federal authority to regulate maritime commerce." FMC Br. 9. Federal maritime commerce has no higher standing in the constitutional scheme than any other form of commerce subject to federal regulation. *Cf. Seminole Tribe*, 517 U.S. at 72.

U.S. at 755-56, *United States v. Texas*, 143 U.S. 621 (1892), and does not raise the specter of unpredictable retroactive liability. The use of such procedures would likewise provide precedent for future FMC enforcement actions. *See* U.S. Br. 24.[9]

The Commission rejects this solution, asserting that it "does not have adequate resources to investigate on its own motion all possible statutory violations" because it has only "eight investigators." FMC Br. 37. The Commission's lack of resources, however, does not justify disregarding the State's immunity from privately prosecuted complaints. While the Commission may not be able to investigate all statutory violations, most allegations of violations are made against private entities and are thus capable of resolution in private complaint proceedings, where a prevailing complainant can also recover its attorney's fees. *See* Federal Maritime Commission, Formal Docket Decisions (available

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[9] The Commission asserts that even if a reparations award against a State is unenforceable, "the issuance of an order finding violations of the Shipping Act is not futile" because the decision will "serve as precedent in future complaint cases and investigations." Pet. App. 37a. But if reparations awards are not enforceable when they are issued against a State (notwithstanding the Commission's civil penalty power), it is surely arbitrary to require a State to respond to a private party's pleadings, motions, discovery requests and subpoenas. While the Commissioners might prefer this method to shield them from the political scrutiny that might attach when they or the Commission's staff conducts an investigation, the Constitution vests the executive power and the obligation to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, in Executive Branch officials and not in private individuals. *See id.* § 1. Moreover, if the Commission's process and orders are indeed unenforceable, it is difficult to understand what precedential value can be derived from a proceeding in which there can be no legal consequence to a party's failure to contest the facts. The order has no more precedential value than an agency's statement of policy, which, of course, the agency is free to reformulate at any time with or without conducting an investigation.

at http://www.fmc.gov/DOCKET.HTM). It is thus far from apparent that the Commission's resources are insufficient to allow it to investigate on its own motion (or refer to its Bureau of Enforcement) allegations of violations committed by state entities. In any event, the Commission's claim of fiscal hardship provides no warrant for overriding the States' constitutional immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 01-46

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IN THE
Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, *et al.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE STATES OF MARYLAND, ALABAMA, ALASKA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WYOMING, AND THE TERRITORY OF GUAM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY

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QUESTION PRESENTED

Does sovereign immunity bar a complaint filed with a federal administrative agency by a private party seeking monetary and injunctive relief against an unconsenting State pursuant to a statute enacted under Congress' Article I powers?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

SOVEREIGN IMMUNITY APPLIES IN ANY PROCEEDING IN WHICH A PRIVATE PARTY SEEKS RELIEF AGAINST AN UNCONSENTING STATE PURSUANT TO ARTICLE I LEGISLATION. 3

A. The States Retained Their Immunity From Claims Filed By Private Parties In Any Forum When They Ratified The Constitution 3

B. The States' Dignity Is Violated By Coercing Their Participation As Defendants In A Federal Administrative Proceeding 12

C. The States' Consent To Suit By The United States Does Not Vest Congress With Authority To Abrogate The States' Immunity From A Complaint Filed By A Private Party With A Federal Administrative Agency 17

D. Immunity Also Bars The Request For Reparations Because Such Relief Can Only Be Requested By And Awarded To Private Parties, And Reparation Orders Can Only Be Enforced In A Federal District Court Action That The Eleventh Amendment Prohibits 20

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Alabama v. Pugh, 438 U.S. 781 (1978) 6

Alden v. Maine, 527 U.S. 706 (1999) ..... *passim*

Arizona v. California, 460 U.S. 605 (1983) 21

Ashwander v. TVA, 297 U.S. 288 (1936) 19

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 8

Behrens v. Pelletier, 516 U.S. 299 (1996) 7

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 18,19

California v. United States, 320 U.S. 577 (1944) 17

Chisolm v. Georgia, 2 Dall. 419 (1793) 15,16

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) 4

Cory v. White, 457 U.S. 85 (1982) 6

Edelman v. Jordan, 415 U.S. 651 (1974) 7,9

Ex parte New York, 256 U.S. 490 (1921) 15

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999) 4,5
Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945) 8
Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991) 15
Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) 16
Green v. Mansour, 474 U.S. 64 (1985) 6
Hans v. Louisiana, 134 U.S. 1 (1890) 9,15,16
Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994) 6
Hilton v. South Carolina Public Railways Comm'n, 502 U.S. 197 (1991) 8
Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 6
In re Ayers, 123 U.S. 443 (1887) 15
Johnson v. Jones, 515 U.S. 304 (1995) 7
Kentucky v. Graham, 473 U.S. 159 (1985) 6
Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) 18
Missouri v. Fiske, 290 U.S. 18 (1933) 7
Mitchell v. Forsyth, 472 U.S. 511 (1985) 7
Nevada v. Hall, 440 U.S. 410 (1979) 10
Nixon v. Fitzgerald, 457 U.S. 731 (1982) 7
Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 21,22
Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 16,17
Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 6,7,8,14

Regents of the University of California v. Doe, 519 U.S. 425 (1997) 6,18
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 5,6,17,22
United States v. Lopez, 514 U.S. 549 (1995) 3
United States v. Mississippi, 380 U.S. 128 (1965) 17
United States v. Morrison, 529 U.S. 598 (2000) 3,4
United States v. Texas, 143 U.S. 621 (1892) 17
Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) ... 4,17,18,19

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS

United States Constitution
Article I ..... *passim*
Article II, § 3 19
Article III 14,23
Amend. XI ..... *passim*
Amend. XIV 4

46 U.S.C. app. 1701(h)(1) 17
46 U.S.C. app. 1702(8) 4
46 U.S.C. app. 1702(15) 4
46 U.S.C. app. 1702(20) 4
46 U.S.C. app. 1710(a) 10,20
46 U.S.C. app. 1710(c) 12,21
46 U.S.C. app. 1710(g) 20,21
46 U.S.C. app. 1710(h)(1) 21
46 U.S.C. app. 1711(a)(1) 13
46 U.S.C. app. 1713(d)(1) 20

Sup. Ct. R. 37 1

46 C.F.R. § 502.42 12
46 C.F.R. § 502.61 13
46 C.F.R. § 502.61(a) 12
46 C.F.R. § 502.62 12
46 C.F.R. § 502.62(a) 13
46 C.F.R. § 502.64(a) 13
46 C.F.R. § 502.64(b) 13
46 C.F.R. § 502.66 12
46 C.F.R. § 502.68 15
46 C.F.R. § 502.68(b) 12
46 C.F.R. § 502.72 12
46 C.F.R. § 502.72(b) 13
46 C.F.R. § 502.113(a) 13
46 C.F.R. § 502.113(b) 13
46 C.F.R. § 502.147 14
46 C.F.R. § 502.201 13
46 C.F.R. § 502.202 13
46 C.F.R. § 502.204 13
46 C.F.R. § 502.205 13
46 C.F.R. § 502.206(a) 14
46 C.F.R. § 502.207 14
46 C.F.R. § 502.207(a)(2)(ii) 14
46 C.F.R. § 502.207(b) 14
46 C.F.R. § 502.223 13

MISCELLANEOUS

1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1765) 9
1 C. Warren, THE SUPREME COURT IN UNITED STATES HISTORY (Rev. ed. 1973) 10
The Federalist Papers, No. 81 (C. Rossiter ed. 1961) 10,11,16

Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of respondent South Carolina State Ports Authority.

INTEREST OF *AMICI CURIAE*

The States have an interest in the question this case presents for two reasons. First, several States have agencies similarly situated to the South Carolina State Ports Authority that engage in port-related activities which give rise to the same types of dispute at issue in this case arising under the Shipping Act of 1984. Second, and more broadly, all States have a direct interest in the central question posed in this case of whether their immunity from suit by a private party extends to federal administrative proceedings that Congress has authorized under its Article I powers.

SUMMARY OF ARGUMENT

Fundamental principles of sovereign immunity bar a private litigant from filing a complaint with a federal administrative agency seeking any relief from the States under the Shipping Act or any other legislation enacted pursuant to Congress' Article I powers. That relief is barred because these immunity principles extend to judicial actions and any other proceeding in which a private party seeks relief against an unconsenting State under Article I legislation. This Court previously held that these principles are not confined by the literal terms of the Eleventh Amendment to cases brought in federal court but, rather, that they also apply to state court cases because the States did not relinquish this key aspect of their sovereignty when they ratified the Constitution, and that sovereignty would be violated by a suit brought against the States in their own courts. As this case illustrates, complaints filed by private parties against the States with federal administrative agencies such as the Federal Maritime Commission are at least as much an affront to the States' dignity because they subject the States to a compulsory process without their consent and thus represent the precise "anomalous and

unheard-of proceedings or suits" that Alexander Hamilton and others assured the States they would not be subjected to by ratifying the Constitution.

Such complaints arguably subject the States to an even greater indignity in light of Congress' undisputed lack of authority under Article I to abrogate the States' immunity in any judicial proceeding. It makes little sense to adopt the views of the leading Framers that it is beyond Congress' Article I powers to abrogate unilaterally the States' immunity from claims brought by private parties in federal or state court, and yet to cast those views aside when the same Article I claims are brought against the States by the same private parties in a forum established by the same Article I powers. The States' immunity is not constrained by the physical contours of the courthouse but retains the same vigor and strength in any proceeding in which a private party seeks relief under Article I legislation against a State that does not consent to be subjected to such a proceeding.

The absence of that consent does not render such legislation unenforceable against the States, which have been deemed to consent to actions brought against them by the United States. Such consent is not transferrable to a private party, however, which may not, as the Federal Maritime Commission and the United States argue, file a complaint against a State with the Commission as a substitute for an agency-initiated investigation. No consent exists in this case because the coercive proceeding in which the South Carolina State Ports Authority was forced to participate was initiated by a private party complaint and not by the federal government, which did not exercise any political responsibility for the action taken against the Authority.

Even had such responsibility been exercised, immunity would still bar the request for reparations made in this case. The Federal Maritime Commission has no authority to seek judicial enforcement of that relief. Rather, reparations can be sought and enforced only by a private party. Thus, as the United States concedes, the Eleventh Amendment would prohibit a federal court from ordering the Authority to pay damages to such a litigant. The same immunity principles that the Amendment exemplifies prohibit the Commission from ordering a State to dip into its treasury and pay reparations to a private party.

In holding that Congress does not have the authority to coerce the States' participation in a federal administrative proceeding and usurp an inviolable element of State independence and integrity, the court of appeals reached a decision that carefully preserves the historic balance of power that underlies and welds the relationship between the federal government and the States. That decision should accordingly be affirmed.

ARGUMENT

SOVEREIGN IMMUNITY APPLIES IN ANY PROCEEDING IN WHICH A PRIVATE PARTY SEEKS RELIEF AGAINST AN UNCONSENTING STATE PURSUANT TO ARTICLE I LEGISLATION.

A. The States Retained Their Immunity From Claims Filed By Private Parties In Any Forum When They Ratified The Constitution.

Although the Shipping Act of 1984 appears to be a valid exercise of Congress' Article I powers because of its seemingly sufficient connection with "broad categories of activities that Congress may regulate under its commerce power," *United States v. Morrison*, 529 U.S. 598, 608 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 558

(1995)), no serious claim can be made that the Act can be defended as "appropriate legislation" under Section 5 of the Fourteenth Amendment. Like the law invalidated in *Morrison*, the Shipping Act "is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor," 529 U.S. at 626, but at "common carriers," 46 U.S.C. app. 1702(8), "maritime terminal operators," *id.*, § 1702(15), "persons," *id.*, § 1702(20), and other entities, none of which expressly include the States.[1]

Rather than constitute an effort by Congress aimed at the "remediation or prevention of constitutional violations," *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 672 (1999), the Shipping Act represents, as the Federal Maritime Commission in this case observed below, "Congress's decision that the regulation of ports, whether publicly or privately owned, is essential to protecting the nation's oceanborne commerce." Appendix to Petition for Writ of

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[1] While this Court has stated that the Shipping Act does "not authorize suits against the States by private parties," *Vermont Agency of Natural Resources v. United States ex rel. Steven*, 529 U.S. 765, 786 n.17 (2000), the court of appeals in this case decided only the question whether sovereign immunity bars a Shipping Act-based complaint filed by a private party against the States with the Federal Maritime Commission. The court did not address "the question whether the statute itself *permits* the cause of action it creates to be asserted against States (which it can do only by clearly expressing such an intent)." *Id.* at 779 (emphasis in original). The *Amici* States also do not address that question, which was not included in the Federal Maritime Commission's petition for a writ of certiorari.

Certiorari ("Pet. App.") 33a. "These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation [abrogating the States' immunity] after *Seminole Tribe* [*of Florida v. Florida*, 517 U.S. 44 (1996)]." *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 648 (1999). Rather, as made clear by that case and several others decided since then, Congress has no authority under the Shipping Act or any other Article I legislation to abrogate unilaterally the States' immunity from claims brought by a private party.

The position of the United States and the Federal Maritime Commission that this proceeding is not barred by immunity is flawed because it is based on an overly restrictive interpretation of these decisions and the doctrine of sovereign immunity. As this Court has stated, "[f]or over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Seminole Tribe of Florida v. Florida*, 517 U.S. at 67. The States' immunity from private suits brought under Article I, however, is neither limited to federal court actions nor restrained by the Eleventh Amendment. That constitutional provision merely "confirmed rather than established sovereign immunity as a constitutional principle." *Alden v. Maine*, 527 U.S. 706, 728-29 (1999). Congress cannot use its Article I powers to strip the States of their immunity from claims brought by a private party in any forum without their consent because, "as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today." *Id.* at 713.

The United States' brief reflects a critical misunderstanding of this feature of the States' sovereignty, and the role that their immunity fulfills "in our system of federalism," *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), in arguing that their immunity is implicated only when there is a "threat to a State's financial integrity." U.S. Br. at 13. While sovereign immunity is aimed in part at "the prevention of federal-court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994); *see also Regents of the University of California v. Doe*, 519 U.S. 425, 431 (1997) ("The Eleventh Amendment protects the State from the risk of adverse judgments"), that is not its sole concern. Rather, on a more fundamental level, according the States immunity from suit "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. at 58 (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 146).

Thus, unlike defenses such as absolute or qualified immunity which are available only to government officials and immunize those individuals only from personal monetary liability, *see, e.g., Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985), the Eleventh Amendment, and the doctrine of sovereign immunity that it exemplifies, applies whenever any relief is sought from a State or one of its agencies, *see Seminole Tribe of Florida v. Florida*, 517 U.S. at 58; *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 146; *Green v. Mansour*, 474 U.S. 64, 73-74 (1985); *Cory v. White*, 457 U.S. 85, 91 (1982); *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), and "necessarily embraces demands for the enforcement of equitable rights and the prosecution of

equitable remedies when these are asserted and prosecuted by an individual against a State." *Missouri v. Fiske*, 290 U.S. 18, 27 (1933).

The Court has underscored the unique status of the States' sovereign character in recognizing that their immunity embraces an "immunity from suit" and not "merely a defense to liability," *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 145, and holding that an order denying a motion to dismiss based on Eleventh Amendment immunity grounds is immediately appealable because, among other reasons, "the value to the States of their Eleventh Amendment immunity . . . is for the most part lost as litigation proceeds past motion practice." *Id.* (footnote omitted). Court orders denying motions asserting absolute and qualified immunity are also immediately appealable, *see Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1982), but the Court has limited interlocutory appeals in those cases to instances in which the denial of immunity "turns on an issue of law," *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996) (quoting *Mitchell v. Forsyth*, 472 U.S. at 530), and does not raise a "question of 'evidence sufficiency.'" *Johnson v. Jones*, 515 U.S. 304, 311-12 (1995). In the context of the States' sovereign immunity, however, the Court has stated that it sees "little basis for drawing such a line." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 147.

Perhaps more significantly, while an appellate court may refuse to consider other immunity defenses when not made at the trial level, "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). Indeed, the Court has stated that "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power

of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 467 (1945). The Court has thus recognized time and again, in a variety of contexts, that the doctrine of State sovereign immunity is not concerned solely with the threat to their "financial integrity" (U.S. Br. at 12, 13, 21) but rather has a broader sweep than any other immunity defense recognized at common law because the States are not "mere prefectures or corporations," *Alden v. Maine*, 527 U.S. at 758, but are instead to be treated by Congress "in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Id.* at 748.

The States' immunity "spells out one instance, but not the only one, in which respect and forbearance is due from the national to the state governments, a respect that cements our federation in the Constitution." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 210 (1991) (O'Connor, J., dissenting). This "fundamental constitutional balance between the Federal Government and the States," *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985), however, is significantly compromised by the United States' argument that applying sovereign immunity "principles in any subsequent court proceeding adequately protects the State's ultimate authority to allocate public resources in the manner it sees fit," U.S. Br. at 21, since by that time the value to the States of their immunity "is for the most part lost. . . ." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 145. That value is entirely lost, and the federal-state balance loses all equilibrium, under the Federal Maritime Commission's position that sovereign immunity does not "preclude Congress from requiring the Commission to adjudicate a private person's complaint that a state-run

marine terminal has violated the Shipping Act." FMC Br. at 8.

As the court of appeals in this case stated, such a proceeding "would not have passed muster at the time of the Constitution's passage nor after the ratification of the Eleventh Amendment." Pet. App. 13a. While Article I administrative agencies did not exist at the time of the constitutional debates, the concept of jurisdiction was well-established, and "[t]he suability of a state, without its consent, was a thing unknown to the law." *Hans v. Louisiana*, 134 U.S. 1, 16 (1890). The type of claims at issue in this case would not have been excepted from this bedrock rule when the States ratified the Constitution, as the very notion of "jurisdiction implies superiority of power," *Alden v. Maine*, 527 U.S. at 715 (quoting 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 234-235 (1765)), and the Constitution's ratification was not intended to disturb the "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the constitution – anomalous and unheard of when the constitution was adopted." *Hans v. Louisiana*, 134 U.S. at 18.

The States did not intend to renounce this significant feature of their sovereignty when they ratified the Constitution. On the contrary, quoting from a leading Supreme Court historian, this Court in *Edelman v. Jordan*, 415 U.S. 651, 660 (1974), observed that "[t]he right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution

was finally adopted." (Quoting 1 C. Warren, THE SUPREME COURT IN UNITED STATES HISTORY 91 (Rev. ed. 1973).) While that debate specifically addressed the proposed Article III clause defining the scope of federal judicial power, and thus "concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts," *Nevada v. Hall*, 440 U.S. 410, 420-21 (1979), the debate's underlying theme involved the more general question whether the Constitution altered the sovereign right of the States not to be subjected to any compulsory process at all without their consent.

The Federal Maritime Commission argues much too narrowly, therefore, that "there is nothing to indicate that the constitutional structure *implicitly* establishes state immunity from the Commission's adjudication of a privately-filed complaint," FMC Br. at 27 (emphasis in original), as "the founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity." *Alden v. Maine*, 527 U.S. at 741. Indeed, in asserting to those opponents that the States' ratification of the Constitution would not have such an effect, Alexander Hamilton acknowledged that the "plan of the convention" identified "circumstances which are necessary to produce an alienation of State sovereignty," The Federalist Papers, No. 81, at 487, 488 (C. Rossiter ed. 1961), but stressed that "there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *Id.* at 488.

The Federal Maritime Commission's reliance on one of those "circumstances" – *i.e.*, where the Constitution "granted an authority to the Union, to which a similar

authority in the States would be absolutely and totally contradictory and repugnant," FMC Br. at 31 (quoting The Federalist No. 32, at 198) – is thus no proof at all that the Constitution gave Congress the power to authorize private citizens to file complaints against the States in any forum. On the contrary, as Hamilton asserted after stating that the Constitution would in some instances necessitate a surrender of sovereignty, "[t]he contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will." The Federalist No. 81, at 488.

In light of passages such as these, the Federal Maritime Commission misstates the central inquiry in this case in asserting that "the Constitution does not *explicitly* preclude federal regulation through reliance on administrative adjudications initiated by private persons against state entities." FMC Br. at 27 (emphasis in original). The question is not whether the States can prove that the Constitution incorporates the doctrine of sovereign immunity – although *Alden v. Maine* confirms that they have and it does – but rather whether those challenging that immunity can provide clear and unequivocal proof that the States agreed to relinquish or qualify in any way their pre-existing right not be sued when they ratified the Constitution. The statements of one of the leading Framers quoted above strongly support the conclusion that the States did not do so, and certainly contain nothing that approaches clear and unambiguous proof that they did. Conversely, neither the Federal Maritime Commission nor the United States has come forward with any "persuasive evidence that the founding generation regarded the States' sovereign immunity as defeasible by federal statute." *Alden v. Maine*, 527 U.S. at 733. As *Alden* illustrates, precisely the opposite understanding existed.

B. The States' Dignity Is Violated By Coercing Their Participation As Defendants In A Federal Administrative Proceeding.

There is little doubt what the States' reaction would have been had they been told that their ratification of the Constitution would have given Congress the authority to make them unwilling participants in the kind of compulsory process that is triggered when a private party files a complaint under the Shipping Act. While the Commission "may investigate any conduct or agreement that it believes may be in violation of" the Act, 46 U.S.C. app. 1710(c), the Commission "shall" conduct an entirely separate procedure when a person claiming a violation of the Act files with the Commission a sworn complaint alleging a violation of the law. *See* 46 U.S.C. app. 1710(a). The latter procedure, according to the Commission's own regulations, may result in "coercive rulings such as payment of reparation or cease and desist orders." 46 C.F.R. § 502.68(b). Despite the efforts of the United States and the Commission to characterize such rulings as mere regulatory action, even a casual reading of the Shipping Act and the Commission's regulations reveals that these rulings are obligatory in nature and the product of a mandatory process initiated by a private party in which a State must "defend or default . . ., by federal fiat and against its will." *Alden v. Maine*, 527 U.S. at 749.

Adjudicatory proceedings before the Commission are initiated either when the Commission issues an order to show cause or a private party files a complaint with the Commission. *See* 46 C.F.R. §§ 502.61(a), 502.66. While the Commission's Director of the Bureau of Enforcement shall be a party in proceedings initiated by a show cause order, "in complaint proceedings under § 502.62, the Director may become a party only upon leave to intervene granted pursuant to § 502.72." 46 C.F.R. § 502.42. Such

leave is granted sparingly. *See* 46 C.F.R. § 502.72(b). The Commission acknowledges, moreover, that "the agency does not have adequate resources to investigate on its own motion all possible statutory violations," FMC Br. at 37, and so it is "necessary for private persons operating in maritime commerce to file complaints in order to ensure that Shipping Act rights are enforced and vindicated." *Id.*

Those complaints "must be verified," 46 C.F.R. § 502.62(a), and served on the party against whom it is filed, either by the Commission, *id.*, § 502.113(a), or the complaining party. *Id.*, § 502.113(b). The subject of the complaint, known as the respondent, *id.*, § 502.64(a), "shall" file an answer with the Commission and serve it on the complainant, usually within twenty days, and "[i]n the event that respondent should fail to file and serve the answer within the time provided, the presiding officer may enter such rule or order as may be just." *Id.*, § 502.64(b). The Shipping Act also provides that "depositions, written interrogatories, and discovery procedures may be utilized by any party under rules and regulations issued by the Commission that, to the extent practicable, shall be in conformity with the rules applicable in civil proceedings in the district courts of the United States." 46 U.S.C. app. 1711(a)(1). The Commission "may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence." *Id.*, § 1711(a)(2).

Formal complaints are referred to the Office of Administrative Law Judges, *see* 46 C.F.R. § 502.61, which assigns an administrative law judge to hold a hearing and render a recommended or initial decision. *Id.*, § 502.223. In the course of preparing for such a hearing, the parties are authorized to conduct discovery, *see id.*, § 502.201, including written and oral depositions, *id.*, §§ 502.202 - .204; interrogatories, *id.*, § 502.205; requests for production of documents and to obtain permission for "entry upon

designated land or other property in the possession or control of the party upon whom the request is served," *id.*, § 502.206(a); and requests for admission. *Id.*, § 502.207. A matter is deemed "admitted unless . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's attorney." *Id.*, § 502.207(a)(2)(ii). The Commission's regulations also provide that "[a]ny matter admitted under this rule is conclusively established unless the presiding officer on motion permits withdrawal or amendment." *Id.*, § 502.207(b).

The presiding officer or administrative law judge also has authority to exercise a range of other functions and powers, including signing and issuing subpoenas, taking or causing depositions to be taken, ruling on proposed pleading amendments, delineating the scope of the proceeding, prescribing the order in which evidence is presented, resolving procedural requests and motions, ruling upon offers of proof and receiving evidence, hearing oral argument, scheduling the submission of written briefs and other documents, and disposing of other matters that typically arise in the course of an evidentiary hearing. *See* 46 C.F.R. § 502.147.

The United States is wrong, therefore, that subjecting an unconsenting State to this process "does not cause the affront to state dignity that might be thought to follow from judicial proceedings whose underlying purpose is the vindication of a private right." U.S. Br. at 24. It offends "the States' dignitary interests," *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 146, to suggest that a State might "choose to ignore" (U.S. Br. at 28) (quotations omitted) such a process, and to infer that the States believe they have some kind of "right to disregard the Constitution or valid federal law" and to "refuse to honor

the Constitution or obey the binding laws of the United States." *Alden v. Maine*, 527 U.S. at 755. It is also simply not credible to argue that the core concerns underlying the doctrine of sovereign immunity are not implicated when the States, as unwilling defendants, are hauled into what few would dispute is a "coercive process . . . at the instance of private parties," *In re Ayers*, 123 U.S. 443, 505 (1887), and are subjected to "coercive rulings." 46 C.F.R. § 502.68.

In arguing that neither the administrative law judge nor the Commission "exercises judicial power," FMC Br. at 20, as described in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), and that a complaint-initiated proceeding before the Commission does not constitute a "suit" as that word "has traditionally been used," U.S. Br. at 15, the Federal Maritime Commission and the United States "engage in the type of ahistorical literalism" that this Court has time and again "rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisolm* [*v. Georgia*, 2 Dall. 419 (1793)]." *Alden v. Maine*, 527 U.S. at 730. The federalism concerns that underlie the States' immunity, and that the Constitution strives to balance, are not limited solely to, or triggered only by, suits brought by citizens of other States, *Hans v. Louisiana*, 135 U.S. 1 (1890), or actions brought "in law or equity," *Ex parte New York*, 256 U.S. 490 (1921), or cases filed in federal court, *Alden v. Maine*, but rather are jeopardized whenever Congress authorizes an individual to file a complaint against a State that triggers an adversarial process which can result in a ruling awarding relief against the State and in favor of the individual.

Although these federalism concerns were disregarded in *Chisolm v. Georgia* in favor of a literalistic reading of Article III, the decision was met with universal disapproval, with the result that the Eleventh Amendment was quickly

ratified thereafter so that it "established in effective operation the principle asserted by Madison, Hamilton and Marshall in expounding the Constitution and advocating its ratification." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934). In establishing "[a] state's freedom from litigation . . . as a constitutional right," *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944), the Eleventh Amendment confirmed the impropriety in subjecting a State to any complaint filed against it by a private party, regardless of the forum.

Indeed, it makes little sense to acknowledge that the views of the leading Federalists "were clearly right, as the people of the United States in their sovereign capacity subsequently decided," *Hans v. Louisiana*, 134 U.S. at 14, by ratifying the Eleventh Amendment in the wake of *Chisolm v. Georgia*, but then to ignore those views when the States are subjected to the type of compulsory process at issue in this case. It would be a strange and hollow protection promised the States if it is beyond the power of the Constitution to override their immunity in federal court, because that would result "in destruction of a pre-existing right of the State governments," The Federalist No. 81 (Hamilton), at 488, but to hold that the abrogation of a functionally identical immunity in another federal forum involving a virtually identical coercive process would not "involve such a consequence," *id.*, and thus would be constitutionally proper. The literalistic approach of the Federal Maritime Commission and the United States that confines the States' immunity to judicial proceedings and exercises of judicial power simply cannot be reconciled with the broader understanding of State sovereignty and dignity that existed when the Constitution was adopted.

C. The States' Consent To Suit By The United States Does Not Vest Congress With Authority To Abrogate The States' Immunity From A Complaint Filed By A Private Party With A Federal Administrative Agency.

While the Federal Maritime Commission argues that "[t]he practical effect of the court of appeals' decision is to prevent the Commission from administering the Shipping Act," FMC Br. at 11, holding that the private party complaint in this case is barred by immunity does not render the Act unenforceable. In ratifying the Constitution, the States have been deemed to consent to suits brought by the United States. *See United States v. Mississippi*, 380 U.S. 128, 140-41 (1965); *United States v. Texas*, 143 U.S. 621, 644-45 (1892). "While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan." *Principality of Monaco v. Mississippi*, 292 U.S. at 329. Although the Shipping Act does not contain "a statutory provision authorizing private suit against a State," *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 781 n.9 (2000), the Act authorizes the United States to initiate a case against the States. *Id.* (citing *California v. United States*, 320 U.S. 577, 585-86 (1944)). *See also* 46 U.S.C. app. 1710(h)(1) ("the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this chapter"). The Commission's concern that its jurisdiction will be divested by a decision upholding South Carolina's immunity thus "wholly disregards" this "other method[] of ensuring the States' compliance with federal law." *Seminole Tribe of Florida v. Florida*, 517 U.S. at 71 n.14.

That method was not chosen here, however, as this proceeding was not initiated by the Commission, apparently because it did "not have adequate resources," FMC Br. at 37, but rather by a private party seeking injunctive relief,

reparations, and attorney's fees. *See* Joint Appendix at 14-16. Congress does not have the power under Article I to authorize citizens to seek such relief from the States. Even when a federal agency has authority to investigate and file suit against the States for violations of federal law the agency is entrusted to administer, Congress nevertheless lacks the authority to abrogate the States' immunity in suits brought against them by private parties under the same law. The Equal Employment Opportunity Commission, for example, can sue the States, but "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals." *Kimel v. Florida Board of Regents*, 528 U.S. 62, 80 (2000). *Accord* U.S. Br. at 21 ("Because the Eleventh Amendment would preclude a district court from exercising jurisdiction over a nonconsenting State in an enforcement action brought by a private party, the FMC's determination that a state entity has violated the Shipping Act cannot be used in furtherance of a private suit for monetary relief.").

Nor does Congress have the power to authorize private parties to file complaints against the States as a "substitute for agency-initiated investigations of prohibited conduct." FMC Br. at 37. Regardless of whether an "administrative agency adjudicates private complaints as part of a larger regulatory mission," U.S. Br. at 21, or whether "[t]he right to file a complaint with the Commission is a public right," FMC Br. at 9-10, the States' consent to be sued by the United States is not transferrable to a private party. On the contrary, this Court in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), expressed "doubt" whether the "Federal Government's exemption from state sovereign immunity . . . can be delegated," *id.* at 785, and stated even greater skepticism about the delegation question in *Vermont Agency of Natural Resources v. United States ex rel. Stevens* in which, after stating that "a *qui tam* relator is, in effect,

suing as a *partial* assignee of the United States," 529 U.S. at 773 n.4 (emphasis in original), the Court declared that it would "express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is 'serious doubt' on that score." *Id.* at 787 (citing *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).

Unlike in *Vermont Agency of Natural Resources*, a private party that files a complaint against a State with the Federal Maritime Commission acts as a *total* assignee of the United States. The States did not consent to such an assignment, as "[t]he consent, 'inherent in the convention,' to suit by the United States – at the instance and under the control of responsible federal officers – is not consent to suit by anyone whom the United States might select." *Blatchford v. Native Village of Noatak*, 501 U.S. at 785. On the contrary, "even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself." *Id.*

It is thus insufficient, as the United States argues, that the Commission's adjudication of a private complaint is "simply one means by which the agency fulfills the responsibility of the Executive Branch to 'take Care that the Laws be faithfully executed.'" U.S. Br. at 23 (quoting U.S. Const. Art. II, § 3). Addressing the same constitutional language quoted by the United States, this Court in *Alden v. Maine* reiterated what it stated in *Blatchford*, namely, that the United States' exercise of such a responsibility "differs in kind from the suit of an individual: While the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures, the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity." 527 U.S. at 755-56. The

United States thus misses the point in asserting that "an adjudication forms part of the agency's responsibility to enforce the law," U.S. Br. at 23, as "[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." *Alden v. Maine*, 527 U.S. at 756. Immunity applies here because the federal government did not exercise any political responsibility for this proceeding.

D. Immunity Also Bars The Request For Reparations Because Such Relief Can Only Be Requested By And Awarded To Private Parties, And Reparation Orders Can Only Be Enforced In A Federal District Court Action That The Eleventh Amendment Prohibits.

Even if the Federal Maritime Commission rather than a private party initiated this proceeding and thus satisfied the "rule that the National Government must itself deem the case of sufficient importance to take action against the State," *Alden v. Maine*, 527 U.S. at 759-60, the request for reparations would still be barred by immunity. The Shipping Act provides that private litigants may seek a reparations award by filing with the Commission a complaint alleging a violation of the Act and a request for "reparation for any injury caused to the complainant by that violation." 46 U.S.C. app. 1710(a). The Act also provides that "the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury . . . caused by a violation of this chapter plus reasonable attorney's fees." *Id.*, § 1710(g). "In case of violation of an order of the Commission for payment of reparation, the person to whom the award was made may seek enforcement of the order in a United States district court having jurisdiction of the parties." *Id.*, § 1713(d)(1).

No similar authorization exists, however, for the Commission to seek or obtain this type of monetary relief. Indeed, while Congress has authorized the Commission to investigate possible violations of the Shipping Act "upon its own motion," 46 U.S.C. app. 1710(c), and to bring suit in federal district court "to enjoin conduct in violation of this chapter," *id.*, § 1710(h)(1), the Commission may order reparations only "upon petition of the complainant and after notice and hearing," *id.*, § 1710(g), and has no authority to file suit in federal district court to enforce any reparations award it has made. Thus, reparations may not be awarded unless they are requested by a private party in a complaint filed with the Commission, and they cannot be made to or judicially enforced by anyone other than the private party. Conversely, no reparations order can be issued unless reparations are sought in a complaint that a private party files with the Commission, which has no authority to seek judicial enforcement of such an order. Neither the request for a reparations award, the entry of a reparations order, nor the filing of a federal court action to enforce such an award can be squared with the command of the Eleventh Amendment that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity" brought against a State by a private party.

The request for reparations would be barred by immunity even if this were a Commission-initiated proceeding, as the United States' presence would "not eliminate the State's immunity for all purposes." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 103 n.12 (1984). In rejecting the States' Eleventh Amendment immunity defense against the claims of several Indian tribes who intervened in a case in which the United States was a party, the Court in *Arizona v. California*, 460 U.S. 605 (1983), pointed out that the tribes did "not seek to bring new claims or issues against the states" and so "our judicial power over

the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Id.* at 614. Such a compromise of immunity would exist in this case, however, because the Federal Maritime Commission may seek only injunctive relief against a State, and only a private party may seek reparations. Thus, "the fact that the federal court could award injunctive relief to the United States . . . would not mean that the court could order the State to pay damages to other plaintiffs." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 103 n.12. Rather, as the United States concedes (U.S. Br. at 21), the Eleventh Amendment would bar such relief.

This is not a Commission-initiated proceeding, however, and so the court of appeals properly ordered the entire case dismissed. That dismissal is not, from a constitutional perspective, "inconsistent with the requirement of national uniformity in the regulation of maritime commerce." FMC Br. at 33. Such an Article I regulatory interest does not override the States' immunity even when "the subject of the suit is in an area . . . that is under the exclusive control of the Federal Government," and "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area." *Seminole Tribe*, 517 U.S. at 72. The court of appeals thus correctly held that sovereign immunity bars a complaint filed with the Federal Maritime Commission by a private party seeking monetary and injunctive relief against an unconsenting State for purported violations of the Shipping Act.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

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IN THE

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FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICUS CURIAE* CHARLESTON NAVAL COMPLEX REDEVELOPMENT AUTHORITY IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE* CHARLESTON NAVAL COMPLEX REDEVELOPMENT AUTHORITY	1
ARGUMENT	3
I. PETITIONERS RELY ON A CONSTRICTIVE AND OVERLY LITERAL TEXTUAL ANALYSIS OF THE ELEVENTH AMENDMENT TO SUPPORT THEIR ARGUMENT THAT STATES ARE NOT IMMUNE FROM PRIVATE COMPLAINT PROCEEDINGS AT FEDERAL AGENCIES	6
A. Private Complaint Proceedings At The Federal Maritime Commission Are Functionally Comparable To Article III Suits At Law For State Sovereign Immunity Purposes	12
II. A FEDERAL AGENCY CANNOT DELEGATE OR ASSIGN ITS ENFORCEMENT POWERS TO A PRIVATE COMPLAINANT	21
A. Complainants Before The FMC Are Not "Relators" In A Qui Tam Sense	23
CONCLUSION	27

TABLE OF AUTHORITIES

CASES

	Page
Alden v. Maine, 527 U.S. 706, 729 (1999)	7, 8, 9, 10, 11, 12
Atascadero State Hospital v. Scanlon, 472 U.S. 234 (1985)	7
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)	22, 24
Bradley v. Fisher, 13 Wall. 335 (1872)	16
Burnette v. Carothers, 192 F.3d 52 (2d. Cir. 1999)	26
Butz v. Economou, 438 U.S. 478 (1978)	16, 17, 18
California v. United States, 320 U.S. 577 (1944)	4
Chisholm v. Georgia, 2 Dall. 419 (1793)	7
Cummings v. Missouri, 71 U.S. 277, 325 (1867)	11
Florida v. United States, 133 F. Supp.2d 1280 (N.D. Fl. 2001)	18, 20
Goldberg v. Kelly, 397 U.S. 254, 266 (1970)	13
Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949)	18
Hans v. Louisiana, 134 U.S. 1 (1890)	7
New York v. United States, 505 U.S. 144, 188 (1992)	21
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	10
Printz v. United States, 521 U.S. 898, 935 (1997).	21
Rhode Island v. United States, 115 F. Supp.2d 269 (D.R.I. 2000)	18, 19
Riley v. St. Luke's Episcopal Hospital, 252 F.3d 749, 757-58 (5th Cir. 2001)	25
Seminole Tribe v. Florida, 517 U.S. 44, 62-63 (1996)	11
State of Ohio Environmental Protection Agency v. United States, 121 F. Supp.2d 1155 (S.D. Ohio 2000)	18, 19

TABLE OF AUTHORITIES—Continued

	Page
U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779, 829 (1995)	11
United States ex rel Fine v. Chevron, USA, Inc. 39 F.3d 957, 962-63 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (en banc)	24
United States ex rel. Foulds v. Texas Tech University, 171 F.3d 279 (5th Cir. 1999)	24
United States ex rel. Long v. SCS Business & Technical Institute, Inc., 173 F.2d 870 (D.C. Cir. 1999)	24, 26
United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center, 961 F.2d 46, 50 (4th cir. 1992)	24
United States ex rel. Rodgers v. Arkansas, 154 F.3d 865, 868 (8th Cir. 1998)	23-24
United States ex rel. Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195 (2d. Cir. 1998), *rev'd on other grounds, Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000)	23, 25
United States v. Lopez, 514 U.S. 549, 583 (1995).	21
Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000)	24
West v. Gibson, 527 U.S. 212 (1999)	5

STATUTES

31 U.S.C. §§ 3729-3733	23, 25
46 U.S.C. app. § 1709(d)(4))	4
46 U.S.C. app. § 1710(b)(10))	4
46 U.S.C. app. § 801 *et seq.*	4
S.C. Code Ann. § 15-78-20(b)	3
S.C. Code Ann. § 15-78-20(e)	2

TABLE OF AUTHORITIES—Continued

	Page
S.C. Code Ann. § 31-12-10 *et* seq	2
S.C. Code Ann. § 31-12-40(A)	2
S.C. Code Ann. § 31-12-110	2
S.C. Code Ann. § 31-12-70	2
REGULATIONS AND RULES	
46 C.F.R. Part 502	13, 14, 15, 16
OTHER AUTHORITIES	
Davis & Pierce Administrative Law Treatise (3d Ed. 1994)	13
Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 Harv. L. Rev. 915, 923 n.50 (1988)	10
Sun, *Congressional Delegation of Adjudicatory Power to Federal Agencies and the Right to Trial By Jury*, 1988 Duke L.J. 539, 539 (1988).	10

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BRIEF FOR *AMICUS CURIAE* CHARLESTON NAVAL COMPLEX REDEVELOPMENT AUTHORITY IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF *AMICUS CURIAE* CHARLESTON NAVAL COMPLEX REDEVELOPMENT AUTHORITY

The Charleston Naval Complex Redevelopment Authority ("RDA") files this brief as *amicus curiae* in support of the position of Respondent South Carolina State Ports Authority.[1] RDA submits this brief with the written consent of all parties, copies of which accompany this brief. *See* Sup. Ct. R. 37(3)(a).

[1] Counsel for *amicus curiae* RDA authored this brief in its entirety. No person or entity other than RDA provided monetary support for the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

The RDA was created by virtue of Executive Order 94-22, signed and executed by the Honorable Carroll A. Campbell, Jr., Governor of the State of South Carolina, on September 30, 1994. The Executive Order was issued pursuant to the authority granted to the Governor and set out in the *Military Facilities Redevelopment Law,* Act No. 462, signed into law by Governor Campbell on June 30, 1994. S.C. Code Ann. § 31-12-10 *et seq.* (hereinafter "Redevelopment Law").

The RDA is a state authority that constitutes "a public body, corporate and politic, exercising public and essential governmental powers." S.C. Code Ann. § 31-12-70. RDA was established with the purpose and authority to acquire, manage, and dispose of the United States-Charleston Naval Complex ("Naval Complex") pursuant to an enactment of the General Assembly of the State of South Carolina. The South Carolina General Assembly established the RDA in response to the U.S. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, to oversee the disposition of real and personal federal property that has been or will be turned over to the State of South Carolina. S.C. Code Ann. § 31-12-40(A).

The Redevelopment Law provides that the RDA is an agency of the State of South Carolina for purposes of the South Carolina Tort Claims Act (hereinafter "S.C. Tort Claims Act"). S.C. Code Ann. § 31-12-110. The S.C. Tort Claims Act provides that the "remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees or its agents." S.C. Code Ann. § 15-78-20(b). The S.C. Tort Claims Act also provides that:

> Nothing in this chapter is construed as a waiver of the state's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina.

S.C. Code Ann. § 15-78-20(e).

In 1999, a private complainant, Carolina Marine Handling, Inc., commenced a complaint action against RDA before the Federal Maritime Commission ("FMC"). The complainant seeks an award of monetary damages from RDA. That action is stayed pending this Court's determination of the question currently before it. RDA asserts that sovereign immunity principles arising from RDA's status as an arm of the State of South Carolina immunize it from private complaints filed before the FMC.

The Court's issuance of a writ of certiorari to the Fourth Circuit Court of Appeals raises issues of direct and immediate concern to RDA. This Court's ruling will determine whether the FMC may allow the private complaint proceeding against the RDA to continue. To that extent, the interests of RDA and Respondent South Carolina Ports Authority are congruent. However, unlike the Respondent, RDA's core functions do not include traditional maritime activities subject to regulatory or enforcement oversight by the FMC acting in its enforcement or investigatory capacity. Rather, RDA's mission involves a wide array of commercial, economic, and land-use development activities generally unrelated to the maritime commerce of the United States. If RDA's assertion of sovereign immunity against unconsented administrative litigation is unavailing, RDA will be forced to defend not only against claims for monetary damages, but also will incur substantial expense in defending its position that it is not a marine terminal operator subject to the personal or subject matter jurisdiction of the FMC.

ARGUMENT

Marine terminal activity and the public and private entities who provide marine facilities are subject, for certain

statutorily enumerated purposes, to the regulatory oversight of the FMC. The provisions of federal law that apply to marine terminals generally require observance of reasonable practices, prohibit unreasonable refusals to deal (46 U.S.C. app. § 1710(b)(10)) and forbid the grant of unreasonable preferences or advantages (46 U.S.C. app. § 1709(d)(4)). Since the enactment of the progenitor federal statute addressing marine terminal practices, the Shipping Act, 1916, 46 U.S.C. app. § 801 *et seq.*, both private entities and state and municipal authorities have been participants in the provision of marine terminal facilities and activities subject to FMC regulation. To the extent there was ever doubt as to whether state port enterprises were subject to direct FMC regulation, these doubts were long ago resolved in *California v. United States*, 320 U.S. 577 (1944), where this Court con-firmed that state and local government entities that provide regulated facilities or services to ocean common carriers are "persons subject" to FMC regulation. The instant case thus in no way places in question the general regulatory authority of the FMC over terminal operations conducted by state authorities.

At issue is whether the complaint proceedings of section 1710(a) of the Shipping Act of 1984, 46 U.S.C. app. § 1701 *et seq.*, somehow permit private citizens to compel unconsenting states to endure administrative litigation before the FMC in actions seeking monetary damages and other forms of relief for alleged violations of the Shipping Act. Sovereign immunity principles clearly bar such suits before state and federal courts. The question presented squarely here is whether a state's acknowledged immunity from private suits in the courts fails to survive when litigation is commenced before a federal administrative agency. To counter the Fourth Circuit Court of Appeals holding that private party administrative complaints impermissibly invade the sovereign prerogatives of the states, the United States looks not to the initiation or conduct of the administrative litigation before the FMC, but to its outcome. The United States argues that states

subjected to administrative litigation by private complainants can ignore awards of damages because the FMC lacks coercive powers independent of Article III courts. The position of the United States thus leaves the states to protect their claims of sovereign immunity as scofflaws evading judgment at the end of a potentially arduous litigation process, rather than as sovereigns asserting rights rooted in the constitutional system at the outset of the proceedings. Moreover, the positions of the United States and the FMC necessarily imply that Congress can, without direct reference to the constitutional relationships of sovereign power between the states and the federal government, divest the states of sovereignty by establishing federal administrative tribunals to hear certain categories of disputes. This conclusion cannot be reconciled with the "dual sovereignty" assumptions reflected in the Constitution and artificially distinguishes between federal assertions of sovereignty against administrative agency action and the equally valid assertions of such sovereignty by the states. *West v. Gibson*, 527 U.S. 212 (1999).

RDA's amicus brief focuses on two arguments advanced by the FMC and the United States. They argue that the Eleventh Amendment's proscription on the exercise of "judicial power" over a "suit in law or equity" is limited, by its terms, to Article III proceedings. Because federal agency adjudication is not a creature of Article III, the FMC and the United States argue that the Eleventh Amendment does not prohibit a private complainant from proceeding against a state before a federal agency. The Eleventh Amendment does not define the boundaries of a state's sovereign immunity. A private complaint proceeding at the FMC bears sufficient indicia of the exercise of federal judicial power that an unconsenting private complaint, if allowed to proceed, would infringe the state's sovereignty and dignitary interest.

Petitioner FMC also asserts that an action commenced by private complainants promotes the uniform application of federal law. To that extent, private complainants are said to serve as *de facto* federal regulators capable of suing states as aides to the FMC. In other words, the FMC suggests that there has been or can be a delegation or assignment of its federal power to a private complainant. RDA asserts that a federal agency cannot delegate such a right. Even if such a right exists, it could not be asserted without the type of express statutory authority found in pertinent qui tam statutes. The Shipping Act does not contain any such statutory authority.

I. PETITIONERS RELY ON A CONSTRICTIVE AND OVERLY LITERAL TEXTUAL NALYSIS OF THE ELEVENTH AMENDMENT TO SUPPORT THEIR ARGUMENT THAT STATES ARE NOT IMMUNE FROM PRIVATE COMPLAINT PROCEEDINGS AT FEDERAL AGENCIES

Petitioner argues that the FMC does not exercise the "judicial power of the United States." FMC Brief at 20-23. Further, Petitioner also contends that a private complaint proceeding brought before an administrative law judge at the FMC is not a "suit in law or equity." FMC Brief at 23-25. Based upon these assertions, a private complaint proceeding brought against a state does not, according to the FMC, constitute an impermissible infringement of a state's sovereignty. The United States reinforces these arguments and places great emphasis on its view that the absence of contempt powers and the need to obtain enforcement orders from Article III courts would permit non-prevailing states to ignore adverse agency rulings at the end of the administrative litigation process. This circumstance, suggests the United States, places the FMC's complaint proceedings outside traditional judicial powers that are the proper measure of

immunities due the sovereign states under the Constitution. U.S. Brief at 16-17.

State immunity from suit is broader than the literal text of the Eleventh Amendment. FMC Brief at 17 (citing *Hans v. Louisiana,* 134 U.S. 1 (1890)). The scope of the states' sovereign immunity is not the exclusive domain of the Eleventh Amendment but is, instead, "demarcated . . . by fundamental postulates in the constitutional design." FMC Brief at 29 (citing *Alden v. Maine*, 527 U.S. 706, 729 (1999)). The FMC and the United States ignore these fundamental postulates and embark on a constrictive, literal, parsing of the text of the Eleventh Amendment to support their positions.

The Eleventh Amendment does not delimit the boundaries of a state's sovereign immunity. In understanding whether a state agency is immune from suit brought by a private complainant at a federal agency, it is important first to accept the long-held view that the Eleventh Amendment did not define or create the concept of state sovereign immunity but merely clarified the states' immunity to the extent it was called into question by *Chisholm v. Georgia,* 2 Dall. 419 (1793). As was set out by this Court, the "Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign immunity except as expressly provided by the Constitution itself." *Atascadero State Hospital v. Scanlon,* 472 U.S. 234, 239, n.2 (1985). Indeed, as this Court recently noted:

> The phrase "Eleventh Amendment Sovereignty" is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by the Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which

> they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Alden v. Maine, 527 U.S. at 713. It is the underlying notion of sovereign immunity that the Eleventh Amendment reaffirmed and that today bars a private complaint proceeding against a non-consenting state before a federal agency. The *Alden* Court emphasized that a state's sovereign immunity is not co-extensive with the boundaries of the Eleventh Amendment, "[t]he bare text of the Amendment is not an exhaustive description of the State's constitutional immunity from suit." *Alden,* 527 U.S. at 736.

Despite *Alden*, Petitioner FMC claims that state sovereign immunity from administrative adjudication cannot be inferred from the history and structure of the Constitution. FMC Brief at 25. Yet, this is precisely the inference compelled by *Alden.* The absence of legislative or federal agency courts at the time of the drafting of the Constitution or the Eleventh Amendment cannot be taken to infer that a private complainant can undertake a cause of action at a federal agency that would otherwise be barred in an Article III court. The underlying principles of sovereign immunity jurisprudence do "not turn on the forum in which the suits were prosecuted." *Alden*, 527 U.S. at 733.

The FMC seeks to dilute the plain meaning of the holding in *Alden* by close analysis of the meaning of the word 'suit'. However, the *Alden* Court's use of the word 'suit' is not coextensive with the scope of the word as used in the Eleventh Amendment. In fact, the Court took pains to point out that the principle of sovereign immunity, and hence the word 'suit', is broader than the scope Article III:

> While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over suits against nonconsenting States, this is not the only structural basis of sovereign immunity implicit in the constitutional design. Rather, "there is also the postulate that States of

> the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution. In exercising its Article I powers Congress may subject the States to private suits in their own courts only if there is "compelling evidence" that the States were required to surrender this power to Congress pursuant to the constitutional design.

Alden, 527 U.S. at 730. (Citations omitted.)

Petitioner argues that the Court's decision in *Alden* is not applicable in the instant case because the "principles explicated in Alden apply, as a matter of historical origin, only to proceedings before a State's own courts." FMC Brief at 27-28. Petitioners are correct in that *Alden* does not address the specific question currently before the Court. Courts are averse to addressing questions that are not before them. However, the Court did provide explicit guidance that compels us to apply fundamental precepts to resolve questions not contemplated by the founders:

> The Court has been consistent in interpreting the adoption of the Eleventh Amendment as conclusive evidence "that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution," and that the views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice Iredell in the dissenting opinion in *Chisholm*, reflect the original understanding of the Constitution. In accordance with this understanding, we have recognized a "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard-of when the constitution was adopted." As a consequence, we have looked to "history and experience, and the established

> order of things," *id. at* 14, rather than "adhering to the mere letter" of the Eleventh Amendment, *id. at 13,* in determining the scope of the States' constitutional immunity from suit.

Alden, 527 U.S. at 727 (citations omitted) (quoting *Hans v. Louisiana*, 134 U.S. at 13-18 (1890)

Federal agency adjudication was an anomalous and unheard-of proceeding when the Constitution and the Eleventh Amendment was adopted. The growth and development of the federal administrative bureaucracy and its "increased impact on the rights and duties of citizens is a well-documented phenomenon of the twentieth century." Sun, *Congressional Delegation of Adjudicatory Power to Federal Agencies and the Right to Trial By Jury*, 1988 Duke L.J. 539, 539 (1988). In fact, the first modern administrative agency, the Interstate Commerce Commission, was not created until 1887. Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 Harv. L. Rev. 915, 923 n.50 (1988). The Court's jurisprudence, from *Hans* to *Alden*, suggests the presumption that States are immune from private complaint proceedings brought before these anomalous and unheard-of fora.

The FMC is an entity established by Congress under its Article I powers. While Congress may establish this separate administrative and judicial body, the agency is still subject to constitutional restrictions. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982) (concluding that an attempt to vest the bankruptcy court, a creation of Article I, with Article III powers was unconstitutional). Those constitutional restrictions include both the states' retained sovereign immunity and the Eleventh Amendment. As was set out in *Alden:*

> Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the State to private suits as a means to achieve objectives otherwise within the scope of the enumerated powers.

Alden, 527 U.S. at 732.

In view of this, a private complainant cannot accomplish indirectly what is denied directly. *See U.S. Term Limits, Inc. v. Thorton,* 514 U.S. 779, 829 (1995). As was set out by this Court over 100 years ago, "[w]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibitions were leveled at the thing, not the name. . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." *Cummings v. Missouri,* 71 U.S. 277, 325 (1867).

Because Congress cannot abrogate a state's sovereign immunity under Article I, *Seminole Tribe v. Florida*, 517 U.S. 44, 62-63 (1996), Congress cannot use the FMC, an Article I creation, to permit a private citizen to sue a state. Otherwise, Congress would impermissibly be doing indirectly what it is forbidden from doing directly, permitting a private suit against a state.[2]

As explained by the Court's cases from *Hans to Alden*, a sovereign immunity argument that relies solely on the plain text of the Eleventh Amendment is incomplete. Even if one were to accept the argument that the terms "judicial power" and "suit in law or equity" were applicable only to Article III courts, that argument will not prevail unless it can be shown that a private complaint proceeding at a federal agency against an unconsenting state does not impinge the underlying

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[2] *See also, Bailey v. Alabama*, 219 U.S. 219, 249 (1911) concluding that a (Constitutional prohibition cannot be transgressed indirectly); *Fairbanks v. U.S.*, 181 U.S. 283, 294 (1901) (noting that Congress cannot do indirectly what it is prohibited from doing directly).

notions of sovereign immunity upon which the Eleventh Amendment is based.

A. Private Complaint Proceedings at the Federal Maritime Commission Are Functionally Comparable to Article III Suits at Law for State Sovereign Immunity Purposes

This case does not present a situation where the United States Government, through the FMC, is seeking to enforce federal maritime laws and regulations against a state agency. Rather, using the FMC as a neutral tribunal, a private citizen is alleging violations resulting in compensable harm. This is the type of situation contemplated by the doctrine of state sovereign immunity generally and the Eleventh Amendment particularly. *Alden*, 527 U.S. at 716 (noting that a suit against a state by the federal government or another state "differs in kind from the suit of an individual . . . the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity."). That the forum for the litigation is an administrative agency sitting as a decider of fact and law does not remove the affront to state sovereignty that such a proceeding would have if it were before a state or federal court. *Alden* recognized that state sovereign immunity has a transcendent durability that is independent of the forum in which the suit is commenced. *Alden*, 527 U.S. at 733.

Private complaint adjudication before federal agencies was unheard of at the time of the drafting of the Constitution and of the Eleventh Amendment. To the extent that we look to the text of the Eleventh Amendment for guidance in determining if a state is immune from suit at a federal agency, the line of cases from *Hans* to *Alden* suggests a broader reading of the terms "judicial power" and "suit in law or equity" than that advanced by Petitioner. The Fourth Circuit carefully reviewed the process and procedures set out for private

complaint proceedings before the FMC and determined that for purposes of state sovereign immunity, they are functionally comparable to Article III actions.

A judicial trial in an Article III proceeding necessarily includes certain procedural and substantive safeguards sufficient to guarantee each party's right to due process. Those safeguards typically provide for: 1) adequate notice of the proceeding and the underlying issues and contentions; 2) the opportunity to confront adverse witnesses; 3) oral presentation of arguments; 4) presentation of evidence; 5) cross-examination of adverse witnesses; 6) disclosure of opposing evidence via the discovery process; 7) the right to counsel; 8) a decision based on the evidence adduced at the adjudication; 9) a determination based on findings of fact and conclusions of law; and 10) a decision by an impartial decision maker. *See Goldberg v. Kelly*, 397 U.S. 254, 266 (1970). *See generally* 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* 378-379 (3d ed. 1994). As is set out in detail below these same safeguards are provided parties to adjudication before the FMC.

The FMC's Rules of Practice and Procedure comport with the APA's procedural requirements. *See* 46 C.F.R. § 502.142 ("In complaint and answer cases formal hearings shall be conducted pursuant to 5 U.S.C. § 554."). A party to a private complaint proceeding before the FMC is accorded the type of procedural safeguards found in Article III courts. *See* 46 C.F.R.§ § 502.1, *et seq.* FMC proceedings are virtually indistinguishable from civil litigation in the federal courts. The FMC's Rules of Practice and Procedure defer expressly to the Federal Rules of Civil Procedure. 46 C.F.R. § 502.12. The following table indicates the degree to which FMC procedural rules describe a litigation process that would be familiar to federal civil litigators:

FMC Rule	Title/Substance	Federal Statute or Rule	Title/Substance
502.12	In proceedings under this part, for situations which are not covered by a specific Com-mission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative process	FRCP	
502.62(a)	Proceeding commenced by filing of complaint.	FRCP 3	Proceeding commenced by filing of complaint.
502.64(a)	Defendant shall file answer.	FRCP 12	Defendant shall file answer.
502.64(b)	Default judgment avail-able if defendant fails to answer.	FRCP 55	Default judgment avail-able if defendant fails to answer.
502.64(d)	Defendant may file counter-claim.	FRCP 13	Defendant may file counterclaim(s).
502.68	Complainant or petitioner may seek a declaratory judgment.	28 U.S.C. § 2201	Plaintiff or petitioner may seek a declaratory judg-ment.
502.71	Defendant may file motion for more definite statement.	FRCP 12(e	Defendant may file motion for more definite statement.
502.72	Intervention	FRCP 24	Intervention
502.73-74	Parties may file motion to dismiss or for summary judgment. As per FMC caselaw these track federal rules and cases.	FRCP 12; 56	Motions to Dismiss and Motions for Summary Judgment.
502.201	"General provisions concern discovery."	FRCP 26	General Provisions Governing Discovery.
502.201(d)	Duty of the parties to meet or confer" to establish a joint discovery schedule for submission to the presiding officer.	FRCP 26 (f)	Duty of parties to meet to discuss the nature of claims and to develop a proposed discovery plan and to submit a written report outlining the plan to the court.

502.201(h)	"Scope of examination." "Persons and parties may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party, including the exist-ence description, nature, custody, condition, and location of any books, docu-ments, or other tangible things, and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."	FRCP 26 (b)	"Discovery scope and limits." "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."
502.201(i)	"Protective orders." May be sought upon motion by a party for good cause shown.	FRCP 26 (c)	"Protective Orders." May be sought by motion upon showing of good faith.
502.202	"Persons before whom deposition may be taken": 202(a) "Within the United States.; 202(b) "In foreign countries"; and 202(c) "Waiver of objection."	FRCP 28	"Persons before whom deposition may by taken": 28(a) Within the United States"; 28(b) "In foreign countries"; and 28(c) "Disqualification for interest."
502.203	"Depositions upon oral examination": 203(a) "Notice of examination"; 203(b) "Record of examina-tion; oath; objection"; 203(c) "Motion to terminate or limit	FRCP 30	"Depositions upon oral examination": 30(b) "Notice of examination"; 30(c) "Examination and cross-examination; record of examination"; oath; object-ion"; 30(d) "Motion

	examination" 203(d) "Submission to witness; changes; signing"; and 203(e) "Certification and filing by officer; copies, notice of filing."		to terminate or limit examin-ation;" 30(e) "Submission to witness; changes; signing"; and 30(f) "Certification and filing by officer; exhibits' copies, notice of filing."
502.204	"Depositions upon written interrogatories": 204(a) "Serving interrogatories; notice" 204(b) "Officer to take responses and prepare record"; and 204(c) "Notice of filing."	FRCP 31	"Depositions upon written questions": 31(a) "Serving questions; notice"; 31(b) "Officer to take responses and prepare record"; and 31(c) "Notice of filing."
502.205	"Interrogatories to parties."	FRCP 33	"Interrogatories to Parties."
502.206	"Production of documents and things and entry upon land for inspection and other purposes."	FRCP 34	"Production of documents and things and entry upon land for inspection and other purposes."
502.207	"Requests for admission"	FRCP 36	"Requests for Admission"
502.209	"Use of deposition at hearings."	FRCP 32	"Use of depositions in court proceedings."
502.210	"Refusal to comply with orders to answer or produce documents; sanctions; enforcement"	FRCP 37	"Failure to make or cooperate in discovery; sanctions."

In addition to these procedural similarities between FMC and trial court procedures, support for the Fourth Circuit's conclusions may be found in this Court's grant of absolute immunity to administrative law judges ("ALJ") from damages liability for their judicial acts. *Butz v. Economou,* 438 U.S. 478 (1978). The Court in *Butz* held that ALJs were entitled to the same type of absolute immunity accorded to Article III judges in 1871. *Id.* at 508 (citing *Bradley v. Fisher,* 13 Wall. 335 (1872)). In so holding, the Court found that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be

immune from suits for damages." *Id.* at 512-513. The Court proceeded to set out those shared characteristics:

> The proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record.

Butz, 438 U.S. at 513 (citations omitted).[3]

As to the role of the ALJ in administrative agency adjudication, the Court in Butz asserted, "[t]here can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge. He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions." *Id.* at 514.

The *Butz* case accorded ALJs the same immunity from suit accorded to Article III judges. The analogy between the immunity from suit accorded ALJs and the immunity from suit sought by respondents is striking. Both cases relate to the underlying dignitary interest of the party seeking immunity. Judge Learned Hand, speaking for the Second Circuit on the question of immunity for public officials, stated that "[t]he justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as

[3] RDA does not assert that private complaint proceedings represent "the" judicial power, "a" judicial power or "some" judicial power of the United States. RDA does assert that proceedings that are functionally comparable to Article III proceedings implicate a state's sovereign immunity within the Constitutional framework.

the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949).

The core concepts underlying *Butz* are fully applicable here. *Butz* invoked the concept of judicial absolute immunity to avoid the affront to those judges and prosecutors tasked with carrying out their appointed tasks. Similarly, RDA seeks the ability to protect its dignitary interests and to avoid the affront to its officers tasked with carrying out its appointed governmental functions.

While clearly not controlling of its disposition of this cause, RDA advises the Court that the issue of state immunity to suit before administrative agencies has been recently active in the lower federal courts. Three district courts have all found that the Eleventh Amendment and the correlative concept of the state's retained sovereign immunity preclude a private complaint proceeding before federal administrative law judges. *See Florida v. United States*, 133 F. Supp.2d 1280 (N.D. Fl. 2001); *State of Ohio Environmental Protection Agency v. United States*, 121 F. Supp.2d 1155 (S.D. Ohio 2000)); *Rhode Island v. United States*, 115 F. Supp.2d 269 (D.R.I. 2000). Each of these cases involved the immunity of states from administrative suits brought before federal agencies under various federal Whistleblower statutes. Each court concluded that the Eleventh Amendment and the concept of state sovereign immunity barred such suits. Each decision indicated that its grant of immunity did not hinder the ability of the United States or one of its agencies from enforcing uniform compliance with federal law. They all stand for the proposition, however, that the responsibility for

enforcement lies with responsible federal officers and not with private complainants.[4]

In *Rhode Island v. United States*, 115 F. Supp.2d 269 (D.R.I. 2000), the district court distinguished agency enforcement proceedings that seek fines and/or penalties from actions brought by private complainants seeking reparations. In holding that state agencies are immune from such actions, the court focused on the judicial-like role played by the ALJ:

> The determination turns on the nature of the proceeding, the relief sought and the role played by the governmental agency rather than on the forum in which the proceeding takes place or how the proceeding is characterized. The critical inquiry is whether the proceeding is one brought by the United States to investigate alleged violations of federal law and to compel compliance; or, whether it is one brought by a private party that seeks an award of damages or other relief against the state. . . . In this case, it is clear that, at least at the ALJ stage, the proceedings in question are not investigations or enforcement actions by DOL; but, rather, are proceedings to adjudicate the individual defendants' claims against the state for alleged violations of the whistleblower provisions.

Id. at 274-275.

In *State of Ohio Environmental Protection Agency v. United States*, 121 F. Supp.2d 1155 (S.D. Ohio 2000) the district court addressed the argument put forward by Petitioners that because federal agencies cannot enforce subpoenas or enforce judgments without recourse to Article III courts the principles of sovereign immunity do not apply,

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[4] Petitioner's arguments about maintaining the uniformity of federal maritime law are unavailing on this point. No party to this case contends that a state or any state agency engaged in activities regulated by the FMC is not subject to federal oversight and investigation. The question of the FMC's enforcement power is not an issue currently before this Court.

> The Department of Labor submits that the proceedings are conducted by the executive, rather than the judicial, branch of the government. The Department observes that, in the course of the proceedings, it may not enforce subpoenas, impanel juries, issue writs or enforce judgments without recourse to an Article III court. . . . The Court disagrees. . . . The ALJ is directed to conduct a full evidentiary hearing, administer oaths, issue subpoenas, rule on evidence, dispose of procedural requests, and make a formal Recommended Decision and Order. Most fundamentally, the record compiled by the agency, particularly the hearing conducted by the ALJ, becomes the basis for any review by an Article III court. . . . For these reasons, this Court concludes that, for the limited purposes of this case, the actions taken by the Department of Labor as a result of Mr. Jayco's complaint, became judicial actions, for purposes of the Eleventh Amendment, at the time the matter was referred to the Administrative Law Judge under 29 C.F.R. § 24.4(d)(3).

Id. at 1163-1164.

The district court in Florida applied the principles this Court reaffirmed in *Alden* to the question of state immunity from administrative litigation. *Florida v. United States*, 133 F.Supp.2d. 1280, 2001 U.S. Dist. LEXIS 18729 (N.D. Fl. 2001) The District Court responded to the notion that the phrase "judicial power of the United States" is not applicable to non-Article III proceedings by stating that "the constitutional principles embodied in the Eleventh Amendment and in the concept of state sovereign immunity are not so easily cabined." *Id.* at ____, 2001 U.S. Dist. LEXIS 18729 * 15. Noting *Alden*'s reference description of unheard of or anomalous proceedings, the Court stated that

> An administrative proceeding prosecuted against a state by a private individual was, beyond question, an "unheard of proceeding" with no precedent in "history and experience" or "the established order of things," either when the Constitution was adopted or, for that matter, until quite recently. . . . If the framers "never imagined or dreamed of" lawsuits in federal courts against states by their own citizens, they surely also did not imagine or dream of claims against states by their own citizens before a federal agency or Administrative Law Judge. . .

Id. at ___, 2001 U.S. Dist. LEXIS 18729 * 19 (emphasis added). The court concluded by noting that our historic concept of federalism requires that "Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Id.* at ___, 2001 U.S. Dist. LEXIS 18729 * 20 (citing *United States v. Lopez*, 514 U.S. 549, 583 (1995) (concurring opinion); *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992)).

If it would be a constitutional affront to the State of South Carolina to be placed in the dock before an Article III court in Charleston without its consent, it surely would not be less so to be compelled to defend before an administrative tribunal established and governed by rules of the FMC under delegation by Congress.

II. A FEDERAL AGENCY CANNOT DELEGATE OR ASSIGN ITS ENFORCEMENT POWERS TO A PRIVATE COMPLAINANT

Petitioner FMC advances the argument that because it is understaffed it is "necessary for private persons operating in maritime commerce to file complaints [against states or state agencies] in order to ensure that Shipping Act rights are enforced and vindicated, and the adjudication of privately-instituted complaints is an efficient substitute for agency-

initiated investigation of prohibited conduct." FMC Brief at 37. The Shipping Acts confer no special status on complainants as extensions or deputies of the FMC. Rather, parties availing themselves of the FMC's complaint procedures are presenting a specialized grievance before what respondents should be able to regard as a neutral tribunal with expertise in the subject matters at issue.

The surface logic of the FMC's argument can only be maintained if the FMC actually has the authority to delegate or assign its investigative or enforcement authority, vis-à-vis states, to a private complainant. Because the FMC has no such authority, either express or implied, this argument fails. Moreover, any such "deputization" of private entities could not be reconciled with APA requirements intended to preserve the neutrality of administrative agencies when they sit as tribunals to adjudicate complaints between private parties.

The Court has addressed the issue of whether the federal government may delegate its own authority to bring actions against the states. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). *Blatchford* held that a statute giving federal district courts original jurisdiction of suits brought by a native tribe involving federal law did not constitute a delegation to the tribes of the United States' ability to sue the states as the tribe's trustee. *Id.* at 785. The court reaffirmed that the "consent, 'inherent in the convention', to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select." *Id.* at 785. The same reasoning should apply here. No party has questioned that the FMC could proceed directly against respondent should it deem such a course necessary to the fulfillment of its statutory obligations. But it cannot overcome sovereign immunity defenses by arguing after the fact, that private complainants are in some way acting as surrogates for the

federal government. Petitioners, unlike those in *Blatchford*, cannot even make the facial argument that there is a statutory delegation of federal authority to private complainants in the Shipping Act.

A. Complainants Before The FMC Are Not "Relators" In A Qui Tam Sense

The FMC's claim that a private complainant stands in the shoes of the FMC for purposes of overcoming a state's sovereign immunity is analogous to claims made by relators in qui tam actions brought against states. Most federal qui tam actions are filed under the False Claims Act ("FCA"). 31 U.S.C. §§ 3729-3733. The FCA imposes civil liability on any "person" who knowingly presents a false claim to the United States for payment. 31 U.S.C. § 3729(a). An action may be commenced by the United States on its own behalf. 31 U.S.C. § 3730(a). Alternatively, a private party ("relator") may commence a civil action in the name of ("*ex rel*") the United States. 31 U.S.C. § 3730(b)(1).

There have been a number of cases involving qui tam suits brought by relators against a state or a state agency. The states have typically interposed a sovereign immunity or Eleventh Amendment defense seeking to bar the action. In response, the relators have argued that because they are suing in the name of the United States, the sovereign immunity of the states is no bar to a qui tam action against a state.

The dispositions of these claims have not been uniform across the circuit courts of appeals. Four circuits have held that, because a qui tam suit against a state is essentially a suit by and for the United States, the Eleventh Amendment poses no bar to the action. *See, e.g., United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195 (2d. Cir. 1998), *rev'd on other grounds, Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d

865, 868 (8th Cir. 1998); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 50 (4th cir. 1992); *United States ex rel Fine v. Chevron, USA, Inc.* 39 F.3d 957, 962-63 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (*en banc*).

Two circuits have come to the opposite conclusion and have held that qui tam actions brought by relators against states or state agencies run afoul of the Eleventh Amendment. *See, e.g., United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.2d 870 (D.C. Cir. 1999); *United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279 (5th Cir. 1999).

This Court, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), determined that a state was not a "person" as defined by the FCA. Because a state was not a person under the FCA, the Court advised that it need not reach the constitutional issue that had split the circuit courts. Because of the nature of this holding, the question of the relator's ability to sue a state in the shoes of the United States has not been disposed of with finality.

The Fifth Circuit extended the principles set out by this Court in *Blatchford* in holding that a qui tam plaintiff cannot qualify as a surrogate for the federal government. *United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279, 293 (5th Cir. 1999). The Fifth Circuit held that merely because a qui tam suit is brought by a private party "on behalf of the United States," the relator's interests and the government's do not necessarily coincide." *Id.* The Fifth Circuit, in a subsequent case, went on to highlight further the distinction between relator's and the United States government. The court of appeals noted, rightfully, that qui tam relators are not officers of the United States, they are not subject to either the benefits or the requirements of officers of the United States and they are not required to establish their

fitness for public employment. *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 757-58 (5th Cir. 2001).

The dramatic difference between qui tam relators and private complainants at the FMC renders meritless the FMC's suggestion that private complainants somehow act on the behalf of the United States in a manner that dissipates sovereign immunity claims. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. at 787. ("We of course express no view on the question whether an action in federal court by a qui tam relator against a State would run afoul of the Eleventh Amendment, but note that there is 'a serious doubt' on that score.").

Qui tam relators sue on behalf of the United States for injuries alleged to have been incurred by the United States. Private complainants at the FMC commence actions in their name and on their behalf for injuries they themselves allege they have suffered at the hands of defendant. In most instances they seek monetary damages. The FCA gives the United States considerable control over a relator's suit. The FMC has no such control over a private complainant. A qui tam relator cannot dismiss his own suit without the written consent of the attorney general. 31 U.S.C. § 3730(c). Private complainants at the FMC have no such restriction. The government may monitor a qui tam proceeding and may stay discovery in certain situations. 31 U.S.C. § 3730(c)(3)-(4). The FMC has no similar authority. The government may dismiss a qui tam suit after notice to the relator and a hearing. 31 U.S.C. § 3730(c)(2)(A). The FMC has no similar authority. In other words, private complaint proceedings are not brought "at the instance and under the control of responsible federal officers." *Blatchford*, 501 U.S. at 785.

That the FMC regards its resources as inadequate to investigate every alleged Shipping Act violation does not provide substantive grounds for compromising a state's sovereign immunity at the hands of a private complainant. The

practical concerns of the FMC's administration of its enforcement authority cannot cause state sovereign immunity to contract. *See United States ex rel. Long,* 173 F.3d at 882 (permitting a qui tam relator to sue a state in federal court based on the government's exemption from the Eleventh Amendment bar raises delegation issues that *Blatchford* so plainly questioned).

Lastly, the fact that the Shipping Act does not provide for qui tam suits prohibits the FMC from asserting that private complainants serve as de facto qui tam relators. There is no common law right to maintain a qui tam action. *See Burnette v. Carothers,* 192 F.3d 52 (2d. Cir. 1999). In *Burnette,* complainants commenced a private citizen enforcement action against a state pursuant to the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365 and other federal environmental statutes. The district court dismissed the case against the state defendants based upon their Eleventh Amendment immunity from suit. On appeal the plaintiffs argued that immunity did not apply because the complaint "was in the nature of a qui tam action and the United States is the real party in interest. *Id.* at 57. The Second Circuit disagreed. It held that there is no common law right to maintain a qui tam action. Authority must always be found in a legislative act. The United States was not, therefore, the real party in interest and hence the case against it was dismissed.

CONCLUSION

The decision of the United States Court of Appeal for the Fourth Circuit should be affirmed.

Respectfully submitted,

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